81-72

No.

Office-Supreme Court, U.S.
FILED
JUL 14 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

H. M. 'MIKE' CANNON, Petitioner,

versus

STATE OF LOUISIANA, Respondent

On Petition for a Writ of Certiorari to
The Supreme Court of Louisiana

PETITION FOR CERTIORARI

STEVE M. MARKS
Attorney for Petitioner
301 St. Charles Street
Baton Rouge, LA 70802
(504) 383-5678

July 6, 1981

QUESTIONS PRESENTED

1. Whether Louisiana Revised Statutes 14:136(1), a criminal statute sweeping broadly and vaguely through protective First Amendment freedoms, violates, on its face and in its application, defendant-petitioner's constitutional rights under the First, Fifth and Fourteenth Amendments of the United States Constitution.

2. Whether the re-trial of defendant violates the prohibition against Double Jeopardy when the first trial ends in mistrial ordered because of prosecutorial misconduct in staging an arrest for perjury of the State's chief witness who was sequestered with the remaining witnesses.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

I. La. R.S. 14:136(1) Violates H.M. "Mike" Cannon's Constitutional Rights Guaranteed By The First And Fifth Amendments Due to Its Vagueness And Overbreadth, On Its Face And In Application To The Facts 7

II. The Re-Trial of Petitioner Constitutes Double Jeopardy After The First Trial Ended in the Mistrial Because Of The Conduct Of The State In Staging The Arrest Of The State's Leading Witness For Perjury Shortly After Testifying And While Sequestered Among The Remaining Witnesses 18

CONCLUSION 25

CERTIFICATE OF SERVICE 26

APPENDIX "A" - Opinion of the Louisiana Supreme Court 1a

APPENDIX "B" - Motions Presented to the Nineteenth Judicial District Court 14a

APPENDIX "C" - Notice of Appeal to the Supreme Court of the United States 32a

APPENDIX "D" - Constitutional Provisions and Statutes 34a

TABLE OF AUTHORITIES

Cases:

Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973) 16

Cantwell v. State of Connecticut, 310 U.S. 296, 311, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1966) 10

Coates v. City of Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed. 2d, 214 (1971) 9

Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1929) 10

Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1121, 14 L.Ed. 2d 22 (1965) 9

Downum v. U.S., 83 S.Ct. 1033, 1034 (1963) 19

Elfbrandt v. Russell, 384 U.S. 11, 18, 86 S.Ct. 1238, 1242 (1966) 10

Ex parte Curtis, 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232 (1882) 11, 15, 16

Gori v. U.S., 81 S.Ct. 1523, 1526 (1961) 19

Huerta v. Flood, 103 Ariz. 608, 447 P.2d 866 (1968) . 11, 12

Lecci v. Cahn, 360 F. Supp. 759, 768 (E.D.N.Y., 1973) ... 16

NAACP v. Button, 371 U.S. 415, 432-3, 83 S.Ct. 328, 337-8 (1963) 10, 13

Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed. 2d 231 (1960) 10

State of Louisiana v. H.M. "Mike" Cannon, 383 So. 2d 389 (La. 1980) 23, 24, 25

State of Louisiana ex rel Gremillion v. NAACP, 366 U.S. 293, 296-297, 81 S.Ct. 1333, 1335, 6 L.Ed 2d 301 (1961) 10

Thornhill v. State of Alabama, 310 U.S. 88, 98, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940) 9

United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 99, 103, 67 S.Ct. 556, 569-571, 91 L.Ed. 754 (1947) 11, 15

United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed. 2d 267 (1976) 24, 25

United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954) 13

United States Civil Service Comm. v. National Association of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed. 2d 796 (1973) 16

U.S. v. Beasley, 479 F.2d 1124 (5th Cir. 1973) 19

U.S. v. Broderick, 425 F. Supp. 93 (S.D. Fla 1977) ... 19, 20

U.S. v. Jorn, 400 U.S. 470, 485, (1971) 19

U.S. v. Kessler, 530 F.2d 1245 (5th Cir., 1976) 19

Statutes:

La. R.S. 14:136(1) 2, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

La. R.S. 14:2 14

U.S. Constitution:

1st Amendment 3

5th Amendment 3

14th Amendment 3

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

H. M. 'MIKE' CANNON, Petitioner,

versus

STATE OF LOUISIANA, Respondent

On Petition for a Writ of Certiorari to
The Supreme Court of Louisiana

PETITION FOR CERTIORARI

Petitioner, H. M. "Mike" Cannon, defendant below, prays that a writ of certiorari issue to review the judgment of the Louisiana Supreme Court, which upheld the decision of the trial court. The trial court refused to declare Louisiana Revised Statutes 14:136 unconstitutional and refused to quash the prosecution and reprosecution of petitioner on the ground of prosecutorial misconduct.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court, on writ of certiorari prior to sentencing; reported at 383 So. 2d 389 (La., 1980) reh. den., *Id.*, appears in Appendix "A" to this petition. Subsequently, these same issues were presented on appeal to the Louisiana Supreme Court and the decision was affirmed, without written opinion.

As appears in Appendix "B", motions were presented to the trial court to quash the indictment on the basis of the unconstitutionality of the underlying statutes and to quash

the prosecution and reprosecution on the grounds of double jeopardy (prosecutorial abuse), together with a motion for new trial on the latter issue with supporting affidavits.

Appendix "C" shows the Notice of Appeal to the Louisiana Supreme Court that its decision was based on federal questons: 1) upholding a Louisiana Statute against a federal constitutional challenge, and 2) upholding the reprosecution of petitioner in violation of the prohibition against Double Jeopardy.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on the 11th day of March, 1981. The motion for rehearing was denied by that Court on the 17th day of April, 1981 (Calogero, Dennis and Lemmon, JJ., would grant a rehearing). This petition for certiorari was filed within ninety days of denial of the rehearing. This Honorable Court's jurisdiction is based on 28 USC Sec. 1257(2) and/or 28 USC Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

La. R.S. 14:136 Public Salary Extortion

Public salary extortion is committed when any person shall:

(1) Solicit or receive, or attempt to solicit or receive, either directly or indirectly, the payment of any money or other thing of value from any public officer or public employee to himself or any other person or political organization, through any means or form whatsoever and for any purpose whatsoever, when such payment is obtained or solicited upon suggestion or threat that the failure to make such payment shall result in the loss or impairment of value to such officer or employee of his office or employment, or when such payment shall

be a reward or remuneration for securing such office or employment; .... *(La. Acts,* 1942, No. 43, Sec. 1) (full text, verbatim at Appendix "D")

II.

United States Constitution, 1st Amendment. See Appendix "D" for verbatim text.

III.

United States Constitution, 5th Amendement. See Appendix "D" for verbatim text.

IV.

United States Constitution, 14th Amendment, Sections 1, 5. See Appendix "D" for verbatim text.

STATEMENT OF THE CASE

Defendant, H. M. 'MIKE' CANNON, Clerk of Court of the Parish of East Baton Rouge, was indicted for violations of Louisiana Revised Statute 14:135, Public Salary Deduction and 14:136(1), Public Salary Extortion, in a two court indictment. Trial was before the court without a jury.

By pretrial motions, defendant moved to quash the indictment based on the unconstitutionality of the underlying criminal statutes. These motions were denied by the trial court. The first trial of defendant was aborted when the prosecution arrested their main witness, Judith Redden, shortly after she testified. At the time of her arrest she was sequestered with the remaining witnesses. Defendant's motion to quash on the grounds of prosecutorial abuse was denied, but defendant's alternative motion for mistrial was granted.

Defendant moved the trial court to quash the second trial on the grounds of Double Jeopardy in that his first trial was aborted by prosecutorial abuse. This motion was denied by the trial court.

Defendant was acquitted of Louisiana Revised Statute 14:135 but was convicted of 14:136(1), Public Salary Extortion.

The evidence adduced at trial was the testimony of defendant's employees, non-classified and non-civil service personnel, of the office of the Clerk of Court of East Baton Rouge Parish, State of Louisiana. The time of the alleged misconduct was during a heated campaign by defendant for re-election to this office. A small minority of the defendant's employees testified on behalf of the State and those witnesses testified that defendant did, in fact, ask them for assistance or "help" during his political campaign, but each affirmatively testified that the defendant made no suggestion or threat concerning their jobs. These witnesses testified that it was their *understanding* that if they agreed to make such a contribution they would be reimbursed that amount through a pay raise.

The defense produced a large number of other employees similarly situated with the State's witnesses giving testimony

as to both private and group discussions on the subject of campaign assistance where the defendant and the State's witnesses were present. Testimony of defendant's witnesses was that the State's witnesses had simply *misunderstood* what was being told to them both privately, publicly and directly by defendant and his co-employees — that they were not being required to contribute or assist in defendant's campaign.

The *only witness,* called by the State, who had actually given a contribution to the defendant was Judith Redden. She testified that she was not required nor asked by the defendant to give the contribution. She was arrested shortly after she left the stand for perjury in front of the remaining witnesses sequestered.

In fact, all of the State's witnesses had subsequently received substantial pay raises but none except Mrs. Redden had ever contributed to defendant's campaign.

Writs of certiorari were granted by Louisiana Supreme Court post-trial and pre-sentence to review the issues presented; i.e., the unconstitutionality of the underlying statues, violation of Double Jeopardy and lack of evidence to support the charges. The decision of the trial court was affirmed. Dissenting Justice Dennis based his opinion on the grounds of Double Jeopardy, i.e., that the second trial of the defendant was a product of prosecutorial abuse concluding the first trial by mistrial.

Subsequently, at the time of sentencing, defendant filed a motion for a new trial of the motion to quash on the grounds of Double Jeopardy producing additional evidence for consideration of the trial court by stipulated affidavits. The trial court denied the defendant's motion for a new trial and sentenced the defendant to a $1,000.00 fine and a five months jail term suspended on active supervised probation for two years.

Finally, by right of appeal, defendant again presented the issues of the unconstitutionality of La. R.S. 14:136(1), Double Jeopardy, and the denial of defendant's motion for a new trial of the motion to quash on the grounds of Double

Jeopardy. The Louisiana Supreme Court affirmed the conviction and denied rehearing (4-3) (Calogero, Dennis and Lemmon, JJ., dissenting.)

From this final decision, defendant, H. M. "Mike" Cannon, has filed this petition for writ of certiorari to the Supreme Court of Louisiana.

REASONS FOR GRANTING THE WRIT.

I.

LA. R.S. 14:136(1) Violates H. M. "Mike" Cannon's Constitutional Rights Guaranteed By The First And Fifth Amendments Due To Its Vagueness And Overbreadth, On Its Face And In Application To The Facts.

Revised Statutes R.S. 14:136, Public Salary Extortion, provides; *inter alia:*

> Public Salary Extortion is committed when **any person** shall: (1) **Solicit,** receive or **attempt to solicit** or receive, either **directly or indirectly** the payment of any money or **other thing of value** from any public officer of public employee to himself or any other personal or **political organization,** through any means of form whatsoever and **for any purpose whatsoever,** when such payment is obtained or **SOLICITED UPON SUGGESTION** or threat that the failure to make such payment shall result in the loss or impairment of value to such officer or employee of his office or employment, or when such payment shall be a reward or remuneration for securing such office or employment; (emphasis supplied).

This statute suffers from the twin constitutional defects of *vagueness and overbreadth.* A criminal statute involving First Amendment rights, this statute must be strictly scrutinized in both respects.

This statute was enacted by the Louisiana Legislature without a model in the early 1940's in the aftermath of the Huey Long administration and long before the courts had become sensitized to constitutional rights and privileges. The reported cases in Louisiana show that prosecution has never been previously based on this statute. In 1980 without change to the operative language the offense was upgraded to a felony. *La. Acts* 1980, No. 454, Sec. 1.

The State's evidence at trial, received in the most favorable light, showed a solicitation for voluntary campaign assistance

and arguably for contributions. All of the State's witnesses, when put to the question of whether they felt threatened, were threatened, or received the suggestion of a threat of impairment in their employment, unequivocably *denied* the same. It is clear that the trial judge, having convicted the defendant of a violation of this statute, equated solicitation or attempted solicitation by an employer with an **implied** suggestion or threat, the position taken by the State in closing argument.

The application of R.S. 14:136, Public Salary Extortion to these facts show that it suffers from the twin constitutional defects of *vagueness* and *overbreadth:* vagueness if it *can* be applied to such conduct; overly broad and capable of unconstitutional application if it *is* applied to such conduct.

APPLICABLE LAW: VAGUENESS AND OVERBREADTH

R.S. 14:136, Public Salary Extortion, invades the sphere of delicate First Amendment rights and privileges by bearing too heavily upon the fundamental rights of association, political affiliation, beliefs and ideas, expressive conduct and speech. For this reason, constitutional review is not limited by the facts of a particular application. The value to all of society of constitutionally-protected expression is deemed to justify allowing "attacks on overly broad statues with no requirement of the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S.Ct. 1116, 1121, 14 L.Ed. 2d 22 (1965). The mere existence of a statute that sweeps too broadly an area protected by the First Amendment "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview ... Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is a statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression." *Thornhill v. State of Alabama*, 310 U.S. 88, 98, 60 S.Ct., 736, 742, 84L.Ed 1093 (1940). In *Coates v. City of Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed. 2d 214 (1971), though the Court was concerned with a vagrancy statute regulating *conduct* rather than *speech*, the Court had no doubt that the ordinance was unconstitutional on its face, and not merely unconstitutional as applied to the particular conduct:

> We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech. *Id.*, 402 U.S. 616, 91 S.Ct. 1689.

Thus, facial invalidity may be raised though the activity in the given case could have been addressed by an appropriately narrowly-drawn statute. Nevertheless, the facts of this case demonstrate the unconstitutional *application* of R.S. 14:136(1), for it is independently urged that no appropriately drawn statute can constitutionally criminalize the conduct shown by the evidence of this case.

Review of the constitutional validity of a statute is two-pronged: *vagueness* and *overbreadth*. Vagueness, though properly a review under due process, when imbedded within First Amendment considerations requires strict scrutiny. "For standards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432-3, 83 S.Ct. 328, 337-8 (1963). The generally perceived test for statutory vagueness is that "men of common intelligence must necessarily guess at its meaning." *Connally v. General Construction Company*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed 322 (1929)

Overbreadth is an independent consideration which does not depend upon the existence of fair notice to the criminally accused, but rather addresses itself to statutory language which, though not vague, reaches protected as well as unprotected conduct, and must therefore be struck down on its face as incapable of any consititutional application.

> A statute touching ... protected rights must be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State. *Cantwell v. State of Connecticut*, 310 U.S. 296, 311, 60 S.Ct 900, 906, 84 L.Ed 1213. Legitimate legislative goals 'cannot be pursued by means that broady stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed. 2d 231. And see *State of Louisiana ex rel. Gremillion vs. NAACP*, 366 U.S. 293, 296-297, 81 S.Ct. 1333, 1335, 6 L.Ed. 2d 301. *Elfbrandt v. Russell*, 384 U.S.11, 18, 86 S.Ct. 1238, 1242 (1966).

Fair construction of R.S. 14:136(1) evidences vagueness and overbreadth encroaching upon delicate rights secured to all

citizens by the Constitution of the United States. The application of R.S. 14:136(1) to reach the conduct in this case establishes, beyond facial unconstitutionality, the unconstitutional application of this statute.

Of course, Louisiana's right to place even-handed restrictions on the *partisan* political conduct of state employees is not questioned. These restrictions serve valid and important state interests which need not be reiterated here. *United Public Workers of America (C.I.O.) v. Mitchell,* 330 U.S. 75, 99, 103, 67 S. Ct. 556, 569-71,91 L. Ed. 754 (1947); *Ex parte Curtis,* 106 U.S. 371, 1 S.Ct. 381, 27L.Ed. 232 (1882). Provisions of other states and of the federal government, though in different language, have sought to address this bona fide legislative purpose, though not always with success.

OVERBREADTH: GENERALLY

The official revision comments to R.S. 14:136 provides no indication as to the source of this statute. However, from Arizona, a similarly worded provision more narrowly drawn and relating directly to the obviously intended "evil", received notable treatment by the Arizona Supreme Court. *Huerta v. Flood,* 103 Ariz. 608, 447 P 2d 866 (1968). A.R.S. Section 13-1021 reads:

> No *public officer or public employee* of the state, a state agency, or a political subdivision shall *directly or indirectly* command, *ask,* coerce, or attempt to coerce any officer or employee of the agency, department, or division for which he has direct supervision, to pay, lend, or contribute any part of his salary or compensation or *anything else of value* to any party, committee, organization, agency or person *for political purposes.* (emphasis supplied).

The Arizona Supreme Court admitted that it found no difficulty holding that the *purpose* behind the above-quoted legislation was constitutional, but found "difficulty ... in finding that certainty or specificity in the new crime ... created" so that men of common intelligence need not necessarily guess as to its meaning and differ as to its application, the first essential of due process of law. *Id.* 868-9. Observing that the Arizona statute could criminalize the conduct of a public of-

ficer or employee who "indirectly ... ask(ed) ... an officer or employee ... over which he has direct supervision to pay, lend, or contribute ... anything ... of value ... for political purposes;" the Arizona Supreme Court decided that in its attempt to curb corrupt practices in politics, the statute had gone too far:

> Has it now become a crime for a school principal who is head of one of the political subdivisions of this state to "ask" a school employee if he would like to circulate literature for a candidate to a political office not in any way connected to the school system? Is it now a crime and a felony for an incumbent legislator to "ask" his secretary if she would mind driving two blocks out of her way to drop some political letters by the post office on the way home? *Id.* at 869.

Implicit in these examples is the "suggestion" that a refusal on behalf of the employee or secretary would result in an impairment to his office or employment should the request be refused. The high court of Arizona finally concluded that:

> (W)e do not believe the legislature can constitutionally, broadly restrict the right of one individual to ask and inquire of another if he would like to make a political contribution. It's an old cliche that 'there's no harm in asking.' *Id.* at 869.

A similar observation can be made concerning the text of R.S. 14:136(1), which could be used to criminalize an:

> attempt to solicit ... either directly or indirectly, the payment of ... thing of value ... to any political organization ... for any purpose whatsoever when such payment is obtained upon suggestion or threat that the failure to make such payment shall result in the impairment of ... employment.

If the interpretation of the trial court is used, i.e. that the solicitation or attempted solicitation *is* the suggestion or threat, then there is no functional difference between R.S. 14:136(1) and the Arizona Statute treated by *Huerta, supra.* The same argument would lead to the same conclusion that

in construing the statute in this fashion, the result is an unconstitutionally overbroad attempt to curb corrupt political practices.

R.S. 14:136(1) simply goes far beyond any sensible scheme of addressing the intended wrong. In increasing order of significance, vagueness and overbreadth problems arise out of the following language elements:

(1) "Suggestion";
(2) "Other thing of value";
(3) "Any other person or political organization, through any means or form whatsoever and for *any purpose* whatsoever,"
(4) "extortion is committed when *any person* shall". (emphasis added)

"Suggestion". The standard rubric of vagueness, i.e., that the criminal statute give a person of ordinary intelligence fair notice that his conduct is criminal, requires phraseology possessed with a definite, understood meaning in application. In *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954), the language of the Federal Regulation of Lobbying Act, 2 U.S.C.A. Sections 261-270, "to *influence*, directly or indirectly, the passage or the defeat of any legislation by Congress", was found to be constitutional because the language was sufficiently restricted and limited by other sections of the Act. In the present case the language used in R.S. 14:136(1), because of the use of the word "suggestion", presents a circumstance of vagueness without other statutory language to provide a limited scope. Standards of permissible statutory vagueness are necessarily more strict in the First Amendment area, *NAACP v. Button*, 371 U.S. 415, 432-3, 83 S.Ct. 328, 337-8, (1963).

According to The Oxford English Dictionary, Oxford University Press (1971), "suggest" means (obsolete passages omitted):

> 1. a. to cause to be present to the mind as an object of thought, an idea to be acted upon, a question or problem to be solved.

b. said of the conscience, feelings, etc. hence, of external things, to prompt the execution of or provide the motive for.

c. to put forward the notion, opinion, or proposition.

...

3. to give a hint or inkling of, without plain or direct expression or explanation.

It is clear that in the employment situation that there is no request or intimidation by a superior, however slight, that does not "suggest" an impairment in the value to the subordinate employee of his office or employment if he does not fulfill his superior's command, desire, wish, or even whim.

The above argument in support of the vagueness of the word "suggestion" is based upon the interpretation given by the trial court that the very solicitation or attempted solicitation was at the *same time* the suggestion or threat involved. Of course, this ignores the specific statutory language which requires that the "payment (be) obtained or solicited *upon* suggestion or threat". Such a construction by the trial court does violence to the statutory language and further evidences the vagueness of the statutory language.

"Other Thing of Value." Vagueness also results from the use of the phrase "other thing of value" which phrase, according to the La. R.S. 14:2, must be given "the broadest possible construction, including any conceivable thing of the slightest value, movable or immovable, corporeal or incorporeal, public or private, including transportation, telephone and telegraph services, or any other services available for hire..." Necessarily including human energy as well as money or funds, the use of this phrase within the context of R.S. 14:136 would criminalize the mere request by a superior public official of the subordinate to give him a lift home from the office. Clearly such a request "suggests" to the subordinate that there would be a loss or impairment of value to his office or employment should he refuse.

"Any Political Organization ... For Any Purpose Whatsoever." R.S. 14:136(1) prohibits the solicitation or receiving by a

public employee or officer of anything of value either by himself or through "any other person or political organization, through any means and for any purpose whatsoever." This brings into focus the overbreadth problem associated with prohibiting political association and affiliation for other than purely partisan politics. R.S. 14:136(1) affirmatively goes beyond the prohibition of partisan politics by prohibiting aid to "any political organization... for any purpose whatsoever."

Even in the fountainhead case of *United Public Workers of America (CIO) vs. Mitchell,* 330 U.S. 75, 67 S.Ct. 556 (1947), wherein restrictions upon political activity of federal employees by the Hatch Political Activity Act, 18 U.S.C.A. Sec. 61(h) were sustained as constitutional, the Supreme Court said:

> (T)his court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political *partisanship* by *classified* employees of government." *Id.* at 567. (emphasis supplied)
>
> The conviction that actively *partisan* governmental personnel threatens good administration had deepened since *Ex parte Curtis. Id.* at 568-9. (emphasis supplied)

In *Mitchell* and other cases which have sustained statutes of this genre, the context has been implementation of a statute governing the activities of *classified employees* through a *civil service commission* which further promulgates rules which are considered in tandem to determine whether the statutory language is overly broad or vague. In Louisiana, R.S. 14:136(1) is not similarly implemented. The stark language of the statute must be sufficient on its face without the aid of regulations of a Commission, for the statute regulates the behavior of non-classified and non-civil service employees of the State of Louisiana. The Clerk of Court for the Nineteenth Judicial District Court, the office of defendant, is *not* staffed by classified employees. R.S. 14:136(1) fails to define "political organization" to encompass only partisan political groups.

In *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973), Sec. 818 of Oklahoma's Merit System of Personnel Administration Act, 74 Okl. St. Ann., Sec. 801, *et seq.*, was challenged on the basis of vagueness and overbreadth. Section 818 was found not be to "substantially" overbroad because the State Personnel Board had construed the statutes' explicit approval of "private" political expression to include virtually any expression not within the context of an active partisan political campaign and the State's Attorney General, in plain terms had interpreted the statute as prohibiting "clearly partisan political activity" only. *Id.* at 2918, 2919. Indeed, in the companion case of *United States Civil Service Comm. v. National Association of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed. 2d 796 (1973), the United States Supreme Court overruled the constitutional challenge to Sec. 9(a) of the Hatch Act, 5 U.S.C.A. Section 7324(a)(2), based upon the vagueness and overbreadth inherent in the term "political activity"; the basis for decision was that Civil Service Commission regulations regarding political activity, the legitimate descendants of the 1940 restatement adopted by Congress, together with the statute itself, cured any constitutional infirmity. *Id.* at 2896-98.

An organization of concerned citizens promoting better environment, highways, mass transit or urging even the passing of tougher anti corruption laws, or promoting the rights of women or minorities would be political organizations and Louisiana Revised Statute 14:136(1) would criminalize **ANY PERSON** who asked public employees to combine their resources for the promotion of such objectives. See *Ex parte Curtis*, 106 U.S. 637, 1 S. Ct. 381, 386-8 (1881) (Bradley, J. dissenting); and *Lecci v. Cahn*, 360 F. Supp. 759, 768 (E.D.N.Y., 1973) (statute prohibiting police from contributing to or soliciting for a political fund was declared unconstitutionally vague and overbroad in violation of the First Amendment). There can be no doubt that any organization of citizens to promote any issue whatsoever is covered by the language of R.S. 14:136(1).

"Any Person". Startling in terms of the overbreadth problem that it presents is the fact that Public Salary Extortion can be committed by *"any person,"* even a person not a public official or public employee. Within the framework of 14:136(1) the

overbreadth problem presented goes far beyond impairment of traditional First Amendment liberties. Without straining the language of R.S. 14:136(1), and by observing that any governmental service is "either directly or indirectly", some "thing of value", we find the average citizen, not a public official/employee, who approaches a public official for any problem of his own or on behalf of any of his friends or acquaintances and who, during the course of redressing his grievance, "suggests" that the inability of the public official to perform will result in an impairment of his office, through the electoral process or otherwise, violates R.S. 14:136(1). For example, in the context of local government, an upset citizen concerned about potholes in his street might indignantly confront a city councilman and warn him that his inability to keep the streets in repair especially in front of his home (the citizen's) will result in the councilman's defeat at the polls. The repair of the potholes is some "thing of value" to the citizen; the "suggestion" that the inability to perform may result in the public official being removed from office through the electoral process is a suggestion of "impairment in the value of his office" to the councilman. R.S. 14:136(1) again has been violated. Remarkably, R.S. 14:136(1) seems to criminalize the typical process of lobbying where, usually with abandon, lobbyists routinely try to influence legislation under the sometimes not so veiled "suggestion" or even the direct "threat" that the failure of the individual legislator to properly vote may result in his removal from office. There can be no doubt that favorable legislation is something of value to the lobbyist and the people he represents, who would be principals to this violation of R.S. 14:136(1).

Constitutionality: Conclusion. From the foregoing, the conclusion is that R.S. 14:136(1) suffers from vagueness and overbreadth in dealing with First Amendment liberties secured to the petitioner by the United States Constitution.

As argued by the State, petitioner submits that the basis of the determination of guilt in this case was that the relationship of employer-employee, *per se*, creates a suggestion or threat. This, as has already been argued, is an unconstitutional application of this statute. Applicant argues that the statute is unconstitutional if, by a reading of its terms, it allows this interpretation. Thus, the effect of the statute is that

it prohibits any discussion of political campaign participation between an employer and his employee. In fact, to interpret the statute as it has been interpreted in this case results in an infringement upon the employees' right to participate in a political campaign, and the chilling effect is patent.

The facts of this case, when viewed in the light most favorable to the State, show a mere solicitation, without more, of employees for campaign fund raising assistance. Application of the statute to these facts demonstrates the unconstitutional *vagueness* of the statutory language if such a construction *can* be made, and demonstrates the unconstitutional *overbreadth* if such a construction *is* made.

II.

The Re-Trial Of Petitioner Constitutes Double Jeopardy After The First Trial Ended In The Mistrial Because Of The Conduct Of The State In Staging The Arrest Of The State's Leading Witness For Perjury Shortly After Testifying And While Sequestered Among The Remaining Witnesses.

This matter was originally set for trial on September 20, 1979, and the trial commenced on that date. On September 20, 1979, the State produced six witnesses prior to the noon recess, one of those witnesses being Ms. Judith Redden who, although called as a State witness, testified favorably to the defendant. During the noon recess, one of the assistant district attorneys prosecuting the case caused the arrest of Ms. Redden on a charge of perjury. This arrest was effected in the presence of most, if not all, of the sequestered witnesses, who were predominantly defense witnesses. On a subsequent defense motion to quash and alternatively for mistrial on the grounds of prosecutorial misconduct resulting in the intimidation of defense witnesses, the trial court, after hearing several witnesses, ruled that the actions of the assistant district attorney had intimidated defense witnesses to such an extent that they could no longer testify freely and voluntarily, and he ordered a mistrial.

The defendant subsequently filed a motion to quash the bill of indictment and the re-trial of defendant on the grounds of Double Jeopardy.

It is defendant's position that the actions of the State in this case, particularly in having Ms. Redden arrested at the time, in the place, and in the manner the act was accomplished, constituted conduct which the courts have previously condemned as prosecutorial "abuse", "overreaching", "manipulation."

Defendant contends that this action of the State forced the defendant to move for a mistrial. Defendant at first sought to avoid this maneuver by moving that the indictment be quashed; however, when that motion was denied, defendant had no choice but to move for a mistrial or proceed with a trial in which the defendant's chances for acquittal had been greatly reduced by the actions of the State.

Defendant submits that because he was forced to request a mistrial by the State's improper actions, this mistrial should not act as a bar to a claim of double jeopardy. As stated in *U.S. v. Beasley*, 479 F.2d 1124 (5th Cir. 1973):

> (A) motion by the defendant for mistrial is ordinarily assumed to remove any barriers to reprosecution ... An exception to the waiver of the right against reprosecution exists, however, when the mistrial motion is a product of prosecutorial overreaching. *Id.* at 1126.

In *U.S. v. Kessler*, 530 F.2d 1245 (5th Cir. 1976) a mistrial was granted upon a motion by the defendant when the government introduced fraudulent evidence. The defendant contended that a subsequent trial would constitute double jeopardy and both the trial court and the 5th Circuit agreed.

Citing *U.S. v. Jorn*, 400 U.S. 470 at 485, *Downum v. U.S.*, 83 S. Ct. at 1034, *Gori v. U.S.*, 81 S. Ct. 1523 at 1526, the Court in *Kessler* also stated:

> Where 'prosecutorial over-reaching' is present, the interests protected by the Double Jeopardy Clause outweigh the public interest in conducting a second trial ending in an acquittal or conviction. *Id.* at 1255.

In *U.S. v. Broderick*, 425 F. Supp. 93 (S.D. Fla 1977), the prosecutor, twice cautioned against eliciting certain hearsay

evidence, deliberately did so anyway, and the defendant moved for a mistrial which was granted. The court found that the defendant's request for a mistrial was caused by prosecutorial overreaching and did not prevent the defendant's taking advantage of the Double Jeopardy Clause at a second trial. In *Broderick*, the court, at page 96 stated:

> The court finds that the "prosecutorial overreaching" defined in *Kessler*, occurred in this case. Clearly the hearsay statement which the prosecutor elicited despite her agreement not to do so, "caused aggravated circumstances to develop which 'seriously prejudice(d) (the) defendant causing him to 'reasonably conclude that a continuation of the trial would result in a conviction.'"
>
> At page 97 the court went on to state:
>
> The last element in the *Kessler* test, that gross negligence or intentional misconduct by the government must trigger the mistrial, is also present in this case.

Defendant submits that the prosecutor's conduct in this case was intended to provoke a mistrial in order to allow the State a second opportunity since it was losing ground in its case; or, was at least grossly negligent and would have otherwise forced the defendant to continue with the trial after defense witnesses had been seriously compromised.

The trial court conducted a hearing on the question of whether or not the public arrest of Ms. Redden had adversely affected defense witnesses. The court heard six defense witnesses, all of whom were obviously highly distraught, one of whom was crying. All had either witnessed Ms. Redden's arrest or had become aware of it immediately after its perpetration. These witnesses testified that although they would testify truthfully, their ability to do so would be hindered by their fear that the State, disagreeing with their testimony, might have them arrested anyway. The trial court, obviously finding that the defense witnesses had been intimidated by the State, declared a mistrial. The State did not object to the court's granting a mistrial, nor has it sought review of the court's granting the motion or the court's finding of fact upon which the court based its decision to declare a mistrial.

Defendant submits that the finding of the trial court on the mistrial motion is, in effect, a finding of fact that the State's conduct did place the defendant in the dilemna of being forced to either move for mistrial or continue with a trial where his witnesses' ability to assist him had been seriously compromised.

The only remaining question is whether or not this conduct was intentional or grossly negligent by a consideration of the circumstances of the arrest:

Necessity of Arrest? There was no necessity that she be arrested immediately. Ms. Redden has been employed at the Clerk's office, in the courthouse building, for the past thirty-one years. She has spent every working day since 1948 in the courthouse. At the time of her arrest she was under subpoena — a subpoena issued by the State. There was no reason to believe that Ms. Redden would not be, the day after the trial was finished, exactly where she had been everyday for the past thrity-one years.

In order to effect the arrest at this time, it was necessary that Mr. Bourland spend the greater part of his lunch time executing an affidavit, finding a judge to sign a warrant, — summonsing *uniformed* sheriffs deputies, and personally participating in the arrest, all of this while he was engaged in the trial of a misdemeanor so important that three assistant district attorneys were in court involved in the trial!

Defendant submits that the only possible reason for arresting Ms. Redden in the courthouse hallway, immediately prior to the commencement of the defendant's case, and in the presence of the sequestered defense witnesses, was to achieve the result actually accomplished — the intimidation of the defense witnesses. No other reason can be found.

History of the Case: In approximately January of this year, the District Attorney presented certain witnesses to the grand jury and emerged with an indictment against the defendant identical to the present one. During the grand jury investigation the defendant was invited to testify. The defendant presented himself to the grand jury, but discovered that instead of being allowed to tell his side of the story, he was instructed to answer 'yes or no' to whether or not he committed the

crimes under investigation. Several days after the first indictment was returned, the defendant was indicted for perjury before the grand jury. Eventually both cases made their way to the Louisiana Supreme Court, which Court, while expressing concern over the propriety of indicting a person for perjury for denying guilt, did not rule on that question, but quashed both bills for improprieties in the grand jury makeup. However, the District Attorney had made it clear that perjury charges were not unlikely in this case — a point which had not been lost by the defense witnesses.

All of the defense witnesses were co-workers with Ms. Redden, know her, and think well of her. Obviously, they were not in a position to determine the validity of the charges against Ms. Redden; however, human nature being what it is they may well have believed her to have been innocent, but to have testified contrary to the wishes of the prosecution. Surely, the Assistant District Attorney must have considered this problem when he caused the arrest of Ms. Redden.

Advantage From Mistrial. Each witness called by the State testified that the defendant had requested assistance in his upcoming campaign. Each State witness *denied* that the defendant had made any suggestion or threat that failure to make the contribution would result in an impairment in the value of their jobs. The witnesses established that they understood that the contribution was to be *voluntary.*

The only witness who actually gave money to the defendant was Ms. Redden, who testified that the contribution was voluntary. Apparently the State disagreed with their witness's testimony and decided, as a tactical matter to stage the perjury arrest.

There was no reason to arrest Ms. Redden in the hallway in the presence of the defense witnesses. The only purpose served thereby was the effect of that arrest upon the witnesses. The intention of the prosecution was to gain tactical advantage by grossly overreaching conduct; the effect was to force the defense to ask for a mistrial which was granted out of hand by the trial judge.

On Certiorari to Trial Court. The Louisiana Supreme Court rendered decision on the hearing of this matter, presentence,

383 So.2d 389 (La. 1980). A dissenting opinion on the issue of double jeopardy was filed by Justice Dennis.

It is difficult to understand the court's reasoning leading up to the conclusion that there was no evidence that the prosecutor's actions seriously prejudiced the defendant. The defendant has the absolute right to be put in jeopardy only once after accusation by the State. The trial judge in granting a motion for a new trial decided that the actions of the prosecutors had prejudiced the defendant unduly in the one trial that he should have to endure. The defendant was forced to ask for a mistrial or to continue the first trial after his witnesses had been seriously compromised. Intent can only be proven circumstantially and it is extremely difficult, if not impossible, without an admission to show that the State deliberately attempted to abort the trial. Bad faith is not required by law.

On consideration by the Louisiana Supreme Court, Justice Dennis, in dissent, found that the prosecution was "grossly negligent"

> ... in arresting a witness who had testified favorably to the defendant, for perjury in a situation where defense witnesses who were about to testify were present or became immediately aware that an arrest had been made. He should have realized that such an arrest at this time and place would have a coercive effect, especially because of his (the prosecutor's) own participation in the arrest. The testimony of the defense witnesses solidly indicates that the prosecutorial misconduct prejudiced the defendant's case and that defendant counsel's conclusion that a continuation of the tainted proceeding would have resulted in an unfair trial was reasonable.
>
> Accordingly, I agree with the majority opinion's statement of law, but I respectfully suggest that it

> has not been applied correctly to the facts of the present case. *Id.* at 396.

Justice Dennis was concerned that the prosecuting attorney, who testified on the Motion to Quash by the defendant, had given no reason or explanation why it was necessary to arrest the witness at that particular time and place.

Both the majority and the dissent agreed that the standard of law is set out by *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed. 2d 267 (1976):

> To find 'prosecutorial overreach[i]ng' the government must have, through 'gross negligence or intentional misconduct', caused aggravated circumstances to develop which 'seriously prejudice(d) a defendant' causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction.' *Id.* at 1080, cited at 383 So.2d at 395.

MOTION FOR NEW TRIAL

Subsequently, defendant filed a motion for a new trial asserting newly discovered evidence on this issue which was presented to the trial judge by affidavits. Essentially there is no conflict in the affidavits and the evidence presented is as follows: (See Appendix "D").

An affidavit from Colonel Sliman of the Sheriff's Department verifies that a request for *uniformed* deputies was made by David Bourland, Assistant District Attorney prosecuting the case. In an affidavit offered on the motion, Mr. Bourland indicated that the request for uniformed deputies was made to "avoid any disturbance or intervention from any spectators present." No reason is given for the need to have arrested this witness, who was under sequestration, at this time and this place.

Ms. Nita Laverdet, a member of the television press, was unable to give her affidavit; nevertheless, it was stipulated at the hearing on the motion for a new trial by the prosecution that if she were present she would testify that Mr. Bonnecaze, an investigator for the District Attorney's office, alerted her

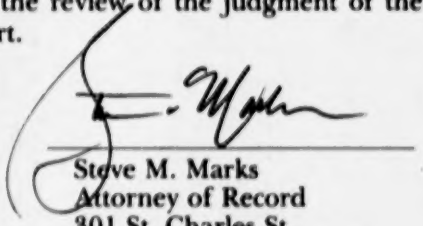
that "something interesting was going to happen." The State offered the affidavit of Mr. Bonnecaze that he was a "bystander" during the discussion of the swearing out of the affidavit for the arrest of Ms. Redden when he "overheard" a prosecutor say that the press would be interested in the upcoming arrest of Ms. Redden because certain members of the press had already questioned the prosecutor as to when they planned to arrest Ms. Redden for perjury.

Clearly, the prosecution, in its affidavits offered in opposition to the motion of new trial for defendant, do not make the admission of any intent to prejudice the defendant's case by their actions. Nevertheless, defendant submits that the affidavits offered and the stipulations entered show that at the very least the conduct of the prosecution in this case was *grossly negligent,* causing "aggravated circumstances to develop which seriously prejudiced defendant causing him to seek a mistrial because of his reasonable conclusion that a continuation of the tainted proceeding would result in a conviction." *United States v. Dinitz, supra; State of Louisiana v. H. M. "Mike" Cannon, supra.*

CONCLUSION

For the above and foregoing reasons, a Writ of Certiorari should issue herein for the review of the judgment of the Louisiana Supreme Court.

Respectfully submitted,



Steve M. Marks
Attorney of Record
301 St. Charles St.
Baton Rouge, LA 70802
(504) 383-5678

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Louisiana have been served on Robert Hester, counsel of record for the State of Louisiana by hand delivery at his office at 222 St. Louis Street, 5th Floor, Governmental Building, Baton Rouge, Louisiana 70802, this 13 day of July, 1981.

I further certify that all parties required to be served have been served.

Steve M. Marks
Attorney of Record

APPENDIX "A"

SUPREME COURT OF LOUISIANA
No. 80-KA-2166
STATE OF LOUISIANA
V.
H. M. "MIKE" CANNON

March 11, 1981
Rehearing Refused April 17, 1981
Appeal from the 19th Judicial District Court,
Parish of East Baton Rouge,
Honorable Frank J. Shea, Judge, Ad Hoc.

PER CURIAM.

Affirmed

SUPREME COURT OF LOUISIANA
No. 66,219
STATE OF LOUISIANA
VERSUS
H. M. "MIKE" CANNON
April 7, 1980

On Writ of Certiorari to The Nineteenth
Judicial District Court, Parish of East Baton Rouge
Honorable Frank Shea, Judge Ad Hoc

WATSON, Justice.*

Relator, H. M. "Mike" Cannon, Clerk of Court of East

Baton Rouge Parish, was convicted of public salary extortion (LSA–R.S. 14:136(1).[1] He contends before this court that there were deficiencies in proof, that the statute under which he was convicted is unconstitutional, and that he was subjected to double jeopardy.

Cannon was indicted for public salary extortion (LSA–R.S. 14:136(1) and public salary deduction (LSA–R.S. 14:135).[2] The indictments were quashed because the grand jury was unlawfully constituted, State v. Cannon, 372 So.2d 1237 (La.,1979), and defendant was reindicted for the same offenses. When a mistrial was granted on motion of defendant, he was tried again and convicted of public salary extortion and acquitted of public salary deduction. A writ of certiorari issued to review defendant's four assignments of error.

ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO

Defendant contends that the trial court erred in refusing to grant a motion for acquittal because the State did not prove essential elements of the offense. It is argued that there was no evidence of threats or offers of reward as required by LSA–R.S. 14;136(1). Defendant contends that there was no evidence of suggestion that a failure to contribute to his campaign fund would result in the "loss or impairment of value" of his employees' jobs, or that the payments by his employees were a "reward or remuneration" for their jobs.

The essential elements of public salary extortion are: (1) solicitation or receipt, or attempted solicitation or receipt, (2) of money or things of value from a public officer or employee, (3) either upon suggestion or threat that failure to pay will result in loss or impairment of value of the employment, *or* when the payment is given as a reward or remuneration for securing the employment.

Among the seven witnesses called by the State there were six employees of defendant's office. None of the State's witnesses testified to overt threats by defendant. However, defendant did ask the supervisors in his office to contribute a full month's salary and the assistants to contribute a half

month's salary, promising that those who helped him would be helped in turn. When one employee asked what he meant, he replied "... through evaluations when evaluation time came." (Tr. 89) According to another witness: "He said that he would give us a raise to make up any contribution to the pledge." (Tr. 133) This employee was told to speak to others and "... remind them that evaluation time was coming up and it would be appreciated." (Tr. 133-134) the witness said: "I was to report before January 15 which employees did or did not pledge." (Tr. 160)

By mentioning the upcoming quarterly evaluations and their concomitant raises when discussing campaign contributions, Cannon gave the clear impression that there would be no raises unless the recommended month's salary or half month's salary was contributed to the campaign fund. The words were spoken in the context of an employer-employee relationship and the reasonable conclusion is that they were intended to intimidate. Although some witnesses testified that they felt no compulsion to contribute, other employees said they assumed that if they contributed they would receive raises.

Defendant contends that there was no evidence to show a threat or suggestion that failure to pay would result in the "loss or impairment of value" of the employment or in the alternative, that the payments were "reward or remuneration for securing" employment. We disagree.

"Impair" is defined as:

> "To weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." Black's Law Dictionary, Fifth Edition, page 677.

Defendant here clearly implied that those employees who agreed to contribute to his re-election campaign would receive salary increases and those who declined would receive no salary increases. Any refusal to cooperate would certainly affect the value of their employment in an injurious manner.

Defendant's final contention with regard to these assignments is that implicit in the trial judge's verdict of not guilty

to the charge of public salary deduction is the finding that defendant did not offer his employees a pay raise in return for political contributions. This contention is without merit. Although defendant was acquitted of public salary deduction, that acquittal does not negate the finding that he offered his employees a pay raise in return for a contribution. The acquittal on the charge of public salary deduction simply means that defendant did not keep part of the employees' pay checks for himself. Instead, he allowed the checks to be dispersed to his employees but expected reimbursement. Therefore, he did not "retain or divert" the funds and could not be found guilty of public salary deduction.

LSA–C.Cr.P. art. 778 governs the motion for acquittal. It provides:

> "In a trial by the judge alone the court shall enter a judgment of acquittal on one or more of the offenses charged, on its own motion or on that of defendant, after the close of the state's evidence or of all the evidence, if the evidence is insufficient to sustain a conviction.
>
> "If the court denies a defendant's motion for a judgment of acquittal at the close of the state's case, the defendant may offer its evidence in defense."

The denial of such a motion may be reversed on appeal only if there is no evidence of the crime or an essential element thereof or where the denial is a palpable abuse of discretion. State v. Vaughn, 378 So.2d 905 (La.,1979). After reviewing the record, we conclude that there was evidence of all essential elements and the trial judge did not abuse his discretion by denying the motion.

These assignments lack merit.

ASSIGNMENT OF ERROR NUMBER THREE

Defendant assigns as error the trial judge's refusal to quash the indictment on the ground that LSA–R.S. 14:136(1) is unconstitutionally vauge and overbroad.

A statute is unconstitutionally vague if men of common intelligence must guess as to its meaning. Connally v. General

Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). To meet due process requirements, the language of the statute must give adequate warning of the conduct proscribed and must also provide standards to enable judges and juries to fairly administer the law. Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367 (1951).

In State v. Dousay, 378 So.2d 414 (La.,1979) the court stated:

> "With regard to the requirement of adequate notice, this court has held that the constitutional guarantee that an accused shall be informed of the nature and cause of the accusation against him requires that a penal statute must describe unlawful conduct with sufficient particularity and clarity that ordinary men of reasonable intelligence are capable of discerning its meaning and conforming their conduct thereto. ... The due process clause of the Louisiana Constitution has also been found to demand that words and phrases employed in statutes or regulations may not be so vague and indefinite that any penalty prescribed for their violation constitutes the taking of liberty or property without due process of law. ... Similarly, a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of the due process clause of the Fourteenth Amendment of the United States Constitution. ... (Citations omitted)
>
> "Both the constitutional guarantees of procedural due process and the right to a fair trial embodied in Article 1, §16 of the Louisiana Constitution also require that a criminal enactment contain an ascertainable standard of guilt and that it 'mark[s] boundaries sufficiently distinct for judges and juries to administer the law in accordance with the legislative will.' City of Baton Rouge v. Norman, 290 So.2d 865, 868 (La.,1974). The United States Supreme Court has held that '[a] law fails to meet

> the requirements of the Due Process Clause if it is so vague and standardless that it ... leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.' Giaccio v. Pennsylvania, 382 U.S. 399, 403, 86 S.Ct. 518, 520-521, 15 L.Ed.2d 447, 450 (1965).
>
> "The constitutional requirement of definiteness is satisfied when the language of a criminal enactment 'has a generally accepted meaning such that a person of ordinary intelligence would be given fair notice of what conduct is forbidden.' State v. Defrances, 351 So.2d 133, 135 (La.,1977), or when 'the crucial words [or] phrases in the criminal statute have a fixed and definite meaning for a person of ordinary intelligence.' State v. Cloud, 248 La. 125, 130, 176 So.2d 620, 622 (1965)." 378 So.2d 416-417.

LSA–R.S. 14:136(1) clearly prohibits the solicitation or receipt, or attempted solicitation or receipt, of a payment from a public officer or employee when that payment is obtained or solicited up on suggestion or threat that the failure to pay will result in the loss of impairment of value of the employment, or when the payment is a reward or remuneration for securing the employment. Defendant had adequate notice that any attempt to use his employees' jobs as leverage in the solicitation of contributions would bring him within the ambit of LSA–R.S. 14:136(1). The statute provides the trier of fact with sufficient standards to fairly determine defendant's guilt or innocence. Only if a payment is solicited or obtained for a public employee as a reward for securing employment or upon suggestion or threat that the failure to pay will have an adverse effect on employment may a defendant be found guilty. The statute gives notice to defendants and provides adequate standards for triers of fact; the statute is not unconstitutionally vague.

Defendant also contends that the statute is overly broad. The overbreadth consideration applies to statutory language which, though not vague, encompasses protected as well as

unprotected conduct. Activities subject to state regulation may not be governed by unnecessarily broad means which invade protected freedoms. NAACP v. Alabama ex rel Flowers, 377 U.S. 288, 84 S.Ct. 1302, 12 L.ED.2d 325 (1964).

Defendant bases his overbreadth argument on a decision of the Arizona Supreme Court invalidating a statute which defendant contends is functionally identical to LSA–R.S. 14:136(1). In Huerta v. Flood, 103 Arizona 608, 447 P.2d 866 (1968), A.R.S. §13-1021 was declared unconstitutional. That statute read:

> "No public officer or public employee of the state, a state agency, or a political subdivision shall directly or indirectly command, ask, coerce, or attempt to coerce any officer or employee of the agency, department, or division, over which he has direct supervision, to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency or person for political purposes."

There is a major distinction between the Arizona statute and the Louisiana statute in question here. The Arizona law prohibited any public officer or employee from seeking political contributions from public employees under his supervision. The Louisiana provision prohibits the use of a public employee's job as leverage in soliciting contributions. While the Arizona statute prohibited the mere asking for contributions, LSA–R.S. 14:326(1) allows solicitation as long as there is no connection between the contribution and the security or value of the employee's job.

Defendant contends that there was no evidence that he overtly threatened his employees and the trial court found

that the mere solicitation implied a threat. Therefore, defendant argues that the Louisiana statute, like the Arizona statute, prohibits mere asking and is unconstitutional. This contention is without merit. The trial judge may have well found that Cannon's mere solicitation did not constitute a threat or suggestion, but rather that the solicitation *coupled with the discussion of quarterly evaluations* constituted the threat or suggestion required by the Louisiana statute. The connection between the contribution and the possible loss or impairment of employment was sufficiently explicit to make the conduct unlawful.

Defendant also contends that several key words in the Louisiana statute render it overly broad. LSA–R.S. 14:3 provides that words are to be "taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." The constructions defendant urges are strained and inconsistent with a reasonable reading of the statute. Read in its usual sense, the language of the statute does not encompass protected conduct and is not overly broad.

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER FOUR

Defendant contends that the trial court erred in denying his motion to quash the indictment on the ground of double jeopardy.

The original trial commenced on September 20, 1979. The state produced seven witnesses prior to the noon recess. Judith Redden, called as a State Witness, testified favorably to defendant. During the noon recess, one of the assistant district attorneys prosecuting the case had Ms. Redden arrested for perjury. Defendant moved to quash his indictment on the ground that defense witnesses would be afraid to testify for fear of arrest. The trial court denied the motion to quash and suggested that the appropriate motion would be for mistrial. Defendant objected to the denial of the motion to quash and moved for a mistrial. After the testimony of five witnesses, a mistrial was declared. Defendant contends that the prosecutor's actions forced him to move for a mistrial and that

the constitutional prohibition against double jeopardy bars his re-prosecution for the same offense.

In United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976) the United States Supreme Court addressed the question of whether the Double Jeopardy Clause of the Fifth Amendment was violated by the retrial of a defendant whose original trial had ended in a mistrial at his request. Ordinarily, the Double Jeopardy Clause does not stand in the way of re-prosecution where defendant has requested a mistrial. However, in *Dinitz*, the court noted:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad faith conduct by judge or prosecutor,' United States v. Jorn, supra, 400 U.S. at 485, 91 S.Ct. at 557, threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. Downum v. United States, 372 U.S. at 736, 83 S.Ct. at 1034, 10 L.Ed.2d at 102. ...." (Citations omitted) 424 U.S. 611.

As was stated in United States v. Martin, 561 F.2d 135 (8th Cir. 1977):

> "Thus where 'prosecutorial overreaching' is present, United States v. Jorn, supra, 400 U.S. at 485, 91 S.Ct. 547, the interests protected by the Double Jeopardy Clause outweigh society's interest in conducting a second trial ending in acquittal or conviction. United States v. Kessler, 530 F.2d 1246, 1255-56 (5th Cir. 1976). See United States v. Wilson, 534 F.2d 76, 80 (6th Cir. 1976)." 561 F.2d 139.

The issue before us, therefore, is whether the arrest of Ms. Redden was such prosecutorial overreaching as to bar further proceedings against defendant.

Mere negligence is not the type of overreaching contemplated by *Dinitz*. Lee v. United States, 432 U.S. 23, 97

S.Ct. 2141, 53 L.Ed.2d 80 (1977); United States v. Martin, supra. As was stated in United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976):

> "To find 'prosecutorial overreaching' the Government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice[d] a defendant' causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction.' United States v. Dinitz, supra, _____ U.S. at _____, 96 S.Ct. at 1080, 47 L.Ed.2d at 274, 44 U.S.L.W. at 4312." 530 F.2d 1256.

Defendant contends that the prosecutor's conduct was intended to provoke a mistrial to allow the State to obtain a more favorable position at a subsequent trial, or to force defendant to continue with the trial after defense witnesses had been seriously compromised.

There is no evidence that the State deliberately attempted to abort the trial. The State opposed defendant's motion for mistrial and sought to elicit testimony from defense witnesses that they would tell the truth despite Ms. Redden's arrest. (Tr. 146, 151, 157, 160 [9/20/79]). The record does not reveal that the State was losing its case and provoked a mistrial to gain an opportunity to begin anew. The prosecutor exhibited no bad faith; the most that can be said is that he was negligent.

Ms. Redden testified that she was arrested while sitting outside the courtroom when other witnesses were in the area. (Tr. 170, [9/20/79]) Although it would have been possible and preferable for the arrest to have taken place elsewhere, all the witnesses who knew of the incident swore that they would testify truthfully despite what they saw or heard. (Tr. 146, 151, 157 160 [9/20/79]) While we cannot condone the prosecutor's actions, there is no evidence that he acted in bad faith or that his conduct was so gross or wanton as to warrant the dismissal of these proceedings on the basis of double jeopardy. Because the witnesses all testified that the pro-

secutor's action would not prevent them from telling the truth, there was no evidence that the action seriously prejudiced defendant.

This assignment lacks merit.

For the reasons assigned, the conviction is affirmed, and the case is remanded to the trial court for sentencing.

AFFIRMED AND REMANDED.

FOOTNOTES

*Honorable Edward A. de la Houssaye, III participated in this decision as Associate Justice ad hoc.

1: LSA–R.S. 14:136(1) provides:

"Public salary extortion is committed when any person shall:

"(1) Solicit or receive, or attempt to solicit or receive, either directly or indirectly, the payment of any money or other thing of value from any public officer or public employee to himself or any other person or political organization, through any means or form whatsoever, and for any purpose whatsoever, when such payment is obtained or solicited upon suggestion or threat that the failure to make such payments shall result in the loss or impairment of value to such officer or employee of his office of employment, or when such payment shall be reward or remuneration for securing such office or employment; and proof that such payments were collected from or paid by such officers or employees on a uniform or progressive percentage or amount basis, shall be presumptive evidence that payments were made under duress or upon the considerations set forth hereinbefore; or".

2: LSA–R.S. 14:135 provides:

"Public salary deduction is committed when any public officer or public employee shall retain or divert for his own use or the use of any other person or political organization, any part of the salary or fees allowed by law to any other public officer or public employee.

"Whoever commits the crime of public salary deduction shall be fined not more than one thousand dollars, or imprisoned for not more than six months, or both."

SUPREME COURT OF LOUISIANA

No. 66,219

STATE OF LOUISIANA
VERSUS
H. M. "MIKE" CANNON

DENNIS, Justice, dissenting.

I respectfully dissent from the majority opinion's holding pertaining to the double jeopardy issue.

In this case a state's witness who had given testimony favorable to the defendant was arrested for perjury in the presence of defense witnesses who had not yet testified. The prosecuting attorney who caused the arrest warrant to issue accompanied the officers during the arrest which occurred in the courthouse hallway during a recess. The prosecuting attorney testified that he assumed that other witnesses would be present in the hallway when the arrest was made. The record contains no explanation of why the prosecuting attorney felt it was necessary to arrest the witness at that particular time and place. The witness was an employee of the clerk of court in the same courthouse and apparently had not been released from sequestration. The other defense witnesses testified that the event made them feel "scared," "apprehensive" and caused them to speculate "if we don't necessarily tell what the District Attorney wants to hear that we may be subject to perjury. .."

Although the defense witnesses, in response to cross examination by one of the prosecuting attorneys, testified that they would tell the truth if forced to testify, it is clear they were unwilling or reluctant to do so because they felt that their truthful testimony would provoke the assistant district attorneys to have them arrested for perjury. Consequently, the trial judge granted the defendant's motion for a mistrial.

As correctly stated by the majority opinion, the Double

Jeopardy Clause bars retrial where the prosecution through gross negligence or intentional misconduct, causes aggravated circumstances to develop which seriously prejudice a defendant, causing him to seek a mistrial because of his reasonable conclusion that a continuation of the tainted proceeding would result in a conviction. United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976); United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976). Applying this rule to the facts of this case, it is my opinion that the Double Jeopardy Clause does not permit a second trial.

The prosecuting attorney was at least grossly negligent in arresting a witness, who had testified favorably to the defendant, for perjury in a situation where defense witnesses who were about to testify were present or became immediately aware that the arrest had been made. He should have realized that such an arrest at this time and place would have a coercive effect, especially because of his own participation in the arrest. The testimony of the defense witnesses solidly indicates that the prosecutorial misconduct prejudiced the defendant's case and that defense counsel's conclusion that a continuation of the tainted proceeding would have resulted in an unfair trial was reasonable.

Accordingly, I agree with the majority opinion's statement of law, but I respectfully suggest that it has not been applied correctly to the facts of the present case.

APPENDIX "B"

State of Louisiana	No. 7-79-451; Crim. Section I
Versus	19th Judicial District court
H. N. "Mike' Cannon	Parish of East Baton Rouge
	State of Louisiana

MOTION FOR NEW TRIAL

H. M. "Mike" Cannon, defendant, through undersigned counsel, respectfully shows as follows:

1.

That this matter was tried on November 16, 1979 and the defendant was convicted of one count of a violation of R.S. 14:136(1). Defendant has not yet been sentenced.

2.

That trial of this matter originally commenced on September 20, 1979, but ended on that date in a mistrial declared by the trial court, upon motion of the defendant, when the prosecutor caused the arrest of a witness on a charge of perjury, and arranged for the arrest to take place in the presence of defense witnesses.

3.

That on September 20, 1979 evidence was presented by the defense on the motion for mistrial, after which the court did in fact declare a mistrial.

4.

That subsequently defendant filed a motion to quash the indictment on the grounds that a second trial, in view of the eariler mistrial which was granted on the grounds of prosecutorial misconduct, would constitute double jeopardy. This motion was denied and the Louisiana Supreme Court affirmed that denial.

5.

That the motion to quash filed on the grounds of double jeopardy was based upon the evidence introduced on September 20, 1979 in the motion for mistrial, and that evidence was made a part of the record in connection with the motion to quash.

6.

The defendant shows that subsequent to September 20, 1979, and accidentally, defendant discovered new evidence which defendant submits is material and that not withstanding the exercise of reasonable diligence, said evidence was not discoverable before September 20, 1979, nor was it discoverable prior to the argument on the motion to quash on the grounds of double jeopardy. Defendant submits that had this additional evidence been introduced on trial of the motion to quash on the grounds of double jeopardy, that the evidence would probably have changed as the result of that hearing, and consequently would have caused the dismissal of the indictment in this matter.

7.

The Louisiana Supreme Court affirmed the trial court's denial of the motion to quash on the grounds of double jeopardy caused by prosecutorial misconduct, stating, "While we cannot condone the prosecutor's actions, there is no evidence that he acted in bad faith or that his conduct was so gross or wanton as to want the dismissal of these proceedings on the basis of double jeopardy." Defendant submits that the newly discovered evidence, set forth below, establishes that the prosecutor did in fact act in bad faith and that his conduct was gross and wanton.

8.

The newly discovered evidence is as follows:

A) After the trial court's ruling on the motion to quash on the grounds of double jeopardy, defendant discovered that the prosecutor, on September 20, 1979, when attempting to effect the arrest of the witness, Ms. Judith Redden, called the Sheriff's department and requested that the arrest be ef-

fected by two uniformed deputies and the arrest was actually made by deputies in plain clothes.

B) That on March 29, 1980, defendant discovered that on September 20, 1979, representatives of the District Attorney's office, immediately prior to the arrest of Ms. Judith Redden, contacted members of the press and television media that they should be present in the hallway outside the court room at lunchtime as "something interesting was going to happen."

9.

Defendant respectfully submits that the two items of evidence set forth above, clearly indicate a premeditation upon the part of the District Attorney's office in establishing the arrest of the witness and that this premeditation constitutes bad faith and gross and wanton misconduct sufficient to constitute prosecutorial misconduct giving rise to a claim of double jeopardy.

10.

Defendant respectfully submits that had the newly discovered evidence been available and introduced upon trial of the motion to quash on the grounds of double jeopardy, that the trial court, and subsequently the Louisiana Supreme Court, would have quashed the indictment, thereby necessarily changing the outcome of this matter by causing its dismissal.

WHEREFORE, defendant respectfully prays that this matter be fixed for hearing, after which the trial court set aside the verdict previously rendered in this matter and order a new trial on the motion to quash on the grounds of double jeopardy.

By Attorney,

/S/
FRANK J. GREMILLION
246 Napoleon Street
Baton Rouge, Louisiana 70802

STEVE M. MARKS
301 St. Charles Street
Baton Rouge, Louisiana 70802

CYRUS J. GRECO
522 Europe Street
Baton Rouge, Louisiana 70802

State of Louisiana
Versus
H. M. "Mike" Cannon

No. 7-79-451; Crim. Section I
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana

State of Louisiana

Parish of East Baton Rouge

Before me, the undersigned authority, duly qualified and commissioned, personally came and appeared H. M. "Mike" Cannon, who after being by me first duly sworn did depose and say that he is the defendant in the foregoing matter and that he has filed, through counsel, an application for new trial based upon newly discovered evidence.

Affiant deposes that notwithstanding the ex rcise of reasonable diligence the new evidence described in the foregoing Application for New Trial was not discovered before or during the trial and particularly the trial of the Motion for Mistrial on September 20, 1979, nor at the time of the argument on the Motion to Quash on the Grounds of Double Jeopardy.

The affiant deposes that the witnesses who will be called to establish the evidence described in the motion are Col. Sliman of the East Baton Rouge Sheriff's department and who is available to testify; Mrs. Nita Laverdet, who is a resident of East Baton Rouge Parish and who is available to testify.

Affiant deposes that he is informed and believes and therefore alleges that Col. Sliman will testify that on September 20, 1979 he was contacted by an assistant district attorney and requested to send two uniformed deputies to effect the arrest of Ms. Judith Redden, but that the Sheriff's department was either unable or unwilling to comply with that request and in fact sent two deputies in plain clothes. Affiant further deposes that he is informed and believes and therefore alleges that Mrs. Nita Laverdet will testify that on September 20, 1979 she was advised by a representative of the District Attorney's office of East Baton Rouge Parish that she and her

camera should be available outside the courtroom in which the Cannon case was being tried, shortly after noon as "Something interesting is going to happen."

Affiant further deposes that the existence of the evidence described above was not discovered until well after the trial of the motion for a mistrial on September 20, 1979, and well after the trial of the motion to quash based on the grounds of double jeopardy.

/S/
H. M. "MIKE" CANNON

Sworn to and subscribed before me this 5th day of June, 1980.

/S/
NOTARY PUBLIC

State of Louisiana
Versus
H. M. "Mike" Cannon

No. 7-79-451 Crim. Section I
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

State of Louisiana

Parish of East Baton Rouge

Before me, the undersigned authority, duly qualified and commissioned, personally came Col. Fred Sliman, who after being by me first duly sworn did depose and say that he is a member of the staff of the Sheriff of East Baton Rouge Parish and has been so employed for a number of years, and was so employed on September 20, 1979. Affiant further deposed that on September 20, 1979 at approximately noon, affiant received a telephone call from Mr. David Bourland, whom affiant knew to be an assistant district attorney of East Baton Rouge Parish, Louisiana, and affiant was asked by the said David Bourland to send two uniformed deputy sheriffs to the Governmental Building in East Baton Rouge Parish to effect the arrest of one Ms. Judith Redden, on a charge of perjury, pursuant to an arrest warrant which had been signed by one of the judges of the 19th Judicial District Court.

Affiant further deposes that he responded to Mr. Bourland's request by informing Mr. Bourland that he would prefer to send plain clothed officers due to the fact that it was raining at that time and uniformed officers were needed for the roads; Mr. Bourland responded that it would be alright to send whoever was convenient and plain clothed officers were sent by appearer.

/S/ _____

COL. FRED SLIMAN

SWORN TO AND SUBSCRIBED before me this 26th day of June, 1980.

/S/ _____

NOTARY PUBLIC

State of Louisiana
Versus
H. M. "Mike" Cannon

No. 7-79-451 Criminal Section I
Nineteenth Judicial District Court
Parish of East Baton Rouge
State of Louisiana

AFFIDAVIT

BEFORE ME, the undersigned notary, personally came and appeared:

J. DAVID BOURLAND

who after being duly sworn by me did depose and say that:

1.

On September 20, 1979, he placed a call from the District Attorney's Office of East Baton Rouge Parish to Colonel Fred Sliman of the East Baton Rouge Sheriff's Office at some time during the noon hour.

2.

The purpose of the conversation with Colonel Sliman was to request Sheriff Department personnel to execute and arrest warrant being prepared by the District Attorney's Office. A request was made for uniformed officers to make the arrest, as is normally done, if available, so to avoid any disturbance by or intervention from any spectators present in the courthouse. A request of this nature is customary and usual procedure for the District Attorney's Office as a uniformed officer's authority is apparent and clear.

/S/
J. DAVID BOURLAND

Sworn to and subscribed before me this 23rd day of June, 1980, in Baton Rouge, Louisiana.

/S/
NOTARY PUBLIC

State of Louisiana
Versus
H. M. "Mike" Cannon

No. 7-79-451 Criminal Section I
Nineteenth Judicial District Court
Parish of East Baton Rouge
State of Louisiana

AFFIDAVIT

BEFORE ME, the undersigned notary, came and appeared:

BOB H. HESTER

who after being duly sworn by me did depose and say that:

1.

While he did not actually witness the arrest of Ms. Judith Redden, he was in the lobby near the courtroom on September 20, 1979 shortly after the arrest.

2.

While in the lobby he observed a female approach one of the defense attorneys and speak to him. Immediately after this, the attorney began gesturing and talking loudly and gathered many of the defense witnesses around him, informing them that Ms. Redden had been arrested for perjury. After this volatile gathering, the defense attorney went back in the courtroom and asked the judge to quash the indictment because the witnesses were too excited and upset by the arrest of Ms. Redden.

3.

Upon receiving the affidavit of Mr. Cannon in support of Motion for New Trial, he asked co-counsel if he knew who the representative from the District Attorney's Office was that spoke to Mrs. Nita Laverdet. Neither he nor co-counsel knew the name of the person referred to in the affidavit, so he telephoned Mrs. Laverdet to verify that someone had spoken to her prior to Ms. Redden's arrest and to determine who that person was. It was only then that he learned that Mr. Bonnecaze had spoken to her.

/S/_____

BOB H. HESTER
ASSISTANT DISTRICT ATTORNEY

Sworn to and subscribed before me this 20th day of June, 1980, in Baton Rouge, Louisiana.

/S/_____

NOTARY PUBLIC

State of Louisiana
Versus
H. M. "Mike" Cannon

No. 7-79-451 Crim. Section I
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana

AFFIDAVIT

BEFORE ME, the undersigned notary public, duly qualified and commissioned in East Baton Rouge Parish, came and appeared:

HENRY BONNECAZE

of the age of competence and residing at East Baton Rouge Parish who, after being duly sworn did depose and say that:

1.

He is an investigator employed at the District Attorney's Office in East Baton Rouge Parish and has been since March of 1972.

2.

He was employed by the District Attorney's Office as an investigator during the period of time encompassing the first trial of the defendant, H. M. "Mike" Cannon, but he was not assigned to this case nor did he work on the case in any manner whatsoever.

3.

On September 20, 1979, during the first trial of the defendant H. M. "Mike" Cannon, he was present in the District Attorney's Office during the noon recess of the first trial of the defendant H. M. "Mike" Cannon. He was a bystander during the discussion among other District Attorney personnel concerning the swearing out of the affidavit and obtaining of the warrant for the arrest of Ms. Judith Redden for perjury in open court.

4.

He overheard a prosecutor say that the press would be interested in the upcoming arrest of Ms. Redden because certain members of the press had already questioned the prosecutor as to when they planned to arrest Ms. Redden for perjury.

Shortly after this, he, on his own, mentioned to Gibbs Adams, a member of the press, that he might stick around because something interesting may happen. He also may have, but does not remember for certain, making any comments to Mrs. Nita Laverdet.

6.

He made this comment to Mr. Adams because he is a personal friend of his. He did not make this comment as a messenger for the District Attorney's Office, upon orders by anyone in the District Attorney's Office. He did so of his personal volition and declined to indicate exactly what was going to happen. His only comment was that something interesting may be taking place and that this reporter member might want to "stick around."

/S/
HENRY BONNECAZE

Thus testified to and signed before me this 23rd day of June, 1980, in Baton Rouge, Louisiana.

/S/
KAY KIRKPATRICK
NOTARY PUBLIC

State of Louisiana
Versus
H. M. "Mike" Cannon

No. 7-79-451 Criminal Section I
Nineteenth Judicial District Court
Parish of East Baton Rouge
State of Louisiana

MOTION TO QUASH

H. M. "Mike" Cannon, defendant, through undersigned counsel, respectfully moves to quash the bill of indictment filed in the above numbered and entitled matter for the following reasons:

1.

That trial for the offenses charged by said bill of indictment would constitute double jeopardy.

2.

That defendant re-urges his earlier motion to quash on the grounds that the indictment filed herein failed to charge an offense which is punishable under a valid statute. Defendant alleges that the statutes charged by said bill of indictment, that is R.S. 14:135 and R.S. 14:136(1) are unconstitutional.

3.

Defendant moved that the testimony presented on the trial of defendant's motion for mistrial had in this matter on September 20, 1979, be made a part of this motion.

WHEREFORE, defendant respectfully prays that this matter be set for hearing after which the bill of indictment be quashed.

By Attorney,

/S/

FRANK J. GREMILLION
704 S. Foster Drive
Baton Rouge, Louisiana 70806

CYRUS J. GRECO
522 Europe Street
Baton Rouge, Louisiana 70802

STEVE M. MARKS
301 St. Charles Street
Baton Rouge, Louisiana 70802

ARTHUR A. VINGIELLO
522 Europe Street
Baton Rouge, Louisiana 70802

CERTIFICATE

I certify that a copy of the foregoing motion has been mailed to the office of the District Attorney of East Baton Rouge Parish this 25th day of September, 1979.

/S/

FRANK J. GREMILLION

State of Louisiana
Versus
H. M. "Mike" Cannon

No. 7-79-451 Crim. Section I
19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana

MOTION TO QUASH

Defendant, through undersigned counsel, respectfully moves the Court to quash both counts of the indictment filed herein for the following reasons:

1.

That the bill of indictment does not conform to a requirement to Article 1, Section 13 of the Louisiana Constitution of 1974, in that it does not inform the accused of the charges against him; and said indictment is in violation of Article 464 of the Louisiana Code of Criminal Procedure in that the bill of indictment does not conform to the requirements of that Article.

2.

The defendant shows that R.S. 14:136(1), a violation of which is charged in Count one of the indictment is unconstitutional in that said statute is too broadly written to conform to constitutional standards of due process and equal protection as required by the constitutions of the United States and of Louisiana; defendant further alleges that said statute is in violation of Article 1, Section 13 of the Louisiana Constitution of 1974.

3.

Defendant further alleges that R.S. 14:136(1) is unconstitutional on the additional grounds that said statute contains an unconstitutional presumption against the defendant's innocence, and said presumption is in violation of the provisions of the Federal and State constitutions. Defendant alleges that said presumption is not severable from the remainder of the statute.

4.

Defendant alleges that R.S. 14:135, a violation of which is charged in Count two of the indictment, is unconstitutional in that said statute is overly broad and does not conform to constitutional standards of due process and equal protection as guaranteed by both the Federal and State constitutions.

5.

Defendant further alleges that R.S. 14:135 is unconstitutional on the additional grounds that said statute does not give the defendant reasonable notice of prohibited conduct.

6.

Defendant further alleges that the bill of indictment filed herein should be quashed on the grounds that same was obtained by the office of the District Attorney in violation of defendant's rights to due process as guaranteed by the constitutions of the United States and the State of Louisiana.

Specifically, defendant alleges that the Assistant District Attorney who presented this matter to the Grand Jury and obtained this indictment, as well as a previous, identical indictment, which was subsequently quashed, has a personal interest in this case which is in conflict with fair and impartial administration of justice.

Defendant is informed and believes, and therefore alleges that the Assistant District Attorney who presented this matter to the Grand Jury and obtained this indictment has a vital, personal interest in preventing the re-election of the defendant to the office of Clerk of Court. Defendant alleges that this personal interest of the said Assistant District Attorney caused an unfair and prejudiced presentation of evidence to the Grand Jury which resulted in the return of an unfounded indictment. Defandant alleges that the return of this indictment is solely for the purpose of adversely affecting the defendant's re-election to the office of Clerk of Court.

Defendant is informed and believes, and therefore alleges that the personal interest of the said Assistant District Attor-

ney in the cause is evidenced by certain statements made by the said Assistant District Attorney well prior to the institution of the investigation of this matter, said statements being to the effect that the defendant had no right to the office of Clerk of Court, that said office belonged to another, and that the defendant would be out of office before the next election.

That in corroboration of the foregoing allegation that the office of the District Attorney, and particularly the Assistant District Attorney who presented this matter to the Grand Jury, had a personal interest in the cause which was in conflict with a fair and impartial administration of justice, defendant shows as follows:

A. That although aware of the names of witnesses whose testimony would be favorable to the defendant, and therefore adverse to the interest of the District Attorney in this case, the Assistant District Attorney presenting this matter to the Grand Jury failed to call said witnesses;

B. That when this identical matter was presented to a Special Grand Jury at an earlier date by the same Assistant District Attorney and the District Attorney, the results of which presentation was an identical bill of indictment, to (sic) witnesses whose testimony was favorable to the defense were intimidated by the office of the District Attorney by being threatened with perjury;

C. That defendant is informed and believes, and therefore alleges that during the time this matter was presented to an earlier Special Grand Jury, and during the time this matter was presented to the Grand Jury which returned the present indictment, the office of the District Attorney stationed several of its investigators outside the defendant's office with instruction to note the names of persons entering said office for the purpose of speaking to defense counsel, in an attempt to hamper the defendant's ability to defend himself;

D. That, when this identical matter was presented

by the same Assistant District Attorney, and the District Attorney, to an earlier, Special Grand Jury, the District Attorney invited the defendant to testify before that Special Grand Jury and represented to the defendant that he would be given a fair opportunity to present evidence and to defend himself; however, when the defendant took advantage of this invitation, he discovered that he was instructed to answer each question "Yes or No," was then asked if he committed the crimes with which he was to be charged, and upon his denial, was charged with perjury;

WHEREFORE defendant shows that the bill of indictment filed herein should be quashed for the reasons set forth above.

By Attorney,

FRANK J. GREMILLION
704 S. Foster Dr., Baton Rouge, La.

CYRUS J. GRECO
522 Europe St., Baton Rouge, La.

/S/
STEVE M. MARKS
301 St. Charles St., Baton Rouge, La.

ARTHUR VINGIELLO
522 Europe St., Baton Rouge, La.

APPENDIX "C"

IN THE SUPREME COURT OF THE STATE OF LOUISIANA

H. M. "MIKE" CANNON, Appellant
versus No. 80-KA-2166
STATE OF LOUISIANA, Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that H. M. "Mike" Cannon, appellant above named, hereby appeals to the Supreme Court of the United States from the judgment of the Surpeme Court of Louisiana entered on the 11th day of March, 1981 and made final by denial of rehearing on the 17th day of April, 1981; wherein said judgment upheld the constitutionality of criminal statues La. R.S. 14:136 and 14:137 and upheld the second trial of defendant in violation of the Double Jeopardy Clause.

This appeal is taken pursuant to U.S.C. § 1257(2) and/or 28 U.S.C. 1257(3).

The clerk will prepare a complete transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States.

Respectfully submitted,

/S/

Steve M. Marks
301 St. Charles St.
Baton Rouge, LA 70802
(504) 383-5678

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing has been mailed, postage prepaid, to all counsel of record.

Baton Rouge, Louisiana, this 19th day of April, 1981.

/S/_____
Steve M. Marks

IN THE SUPREME COURT OF THE STATE OF LOUISIANA

H. M. "MIKE" CANNON, Appellant
versus No. 80-KA-2166
STATE OF LOUISIANA, Appellee

AFFIDAVIT OF SERVICE

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

I, STEVE M. MARKS, attorney of record for H. M. "Mike" Cannon, appellant/applicant herein, do depose and say that on the 19th day of May, 1981, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States in the State of Louisiana, appellee herein, by delivering the same to the receptionist at the office of the District Attorney, Parish of East Baton Rouge, Baton Rouge, Louisiana.

/S/_____
Steve M. Marks

SWORN TO AND SUBSCRIBED before me this 19th day of May, 1981.

/S/_____
Notary Public

APPENDIX "D"

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

Louisiana Revised Statute 14:136
Public Salary Extortion

Public salary extortion is committed when any person shall:

(1) Solicit or receive or attempt to solicit or receive, either directly or indirectly, the payment of any money or other thing of value from any public officer of public employee to himself or any other person or political organization, through any means or form whatsoever and for any purpose whatsoever, when such payment is obtained or solicited upon suggestion or threat that the failure to make such payment shall result in the loss or impairment of value to such officer or employee of his office or employment, or when such payment shall be a reward or remuneration for securing such office or employment; and proof that such payments were collected from or paid by such officers or employees on a uniform or progressive percentage or amount basis, shall be presumptive evidence that payments were made under duress or upon the considerations set forth hereinbefore; or

(2) Solicit or receive or attempt to solicit or receive, either directly or indirectly, the contribution of any money or other thing of value for any general, primary or special election or for any other political purpose, from any person holding any office or employment for remuneration or profit, including those persons who work on a commission basis, with the state, who receive a remuneration of two hundred dollars per month or less from such employment; provided that this subdivision shall not apply where the person solicited or whose contribution was received was an elective public officer or a candidate for any elective public office.

Whoever commits the crime of public salary extortion shall be fined not more than one thousand dollars, or imprisoned for not more than six months, or both.

II.

U.S. Constitution, 1st Amendment

Freedom of religion, speech and press; peaceful assemblage, petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

III

U.S. Constitution, 5th Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

IV.

U.S. Constitution, 14th Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 5. The Congress shall have the power to enforce, by appropriate legislation the provisions of this article.

Office - Supreme Court, U.S.
FILED
OCT 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-72

IN THE

Supreme Court of the United States
OCTOBER TERM, 1981

H.M. "MIKE" CANNON,
Petitioner,

versus

STATE OF LOUISIANA,
Respondent

On Petition for a Writ of Certiorari to
The Supreme Court of Louisiana

OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
BARBARA B. RUTLEDGE
Assistant Attorney General
State of Louisiana
OSSIE BROWN
District Attorney
Nineteenth Judicial District
Baton Rouge, Louisiana
ROBERT H. HESTER
Assistant District Attorney
Nineteenth Judicial District
Baton Rouge, Louisiana
E. KAY KIRKPATRICK
Assistant District Attorney
222 St. Louis Street
Baton Rouge, Louisiana 70801
(504) 389-3453

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner's conviction for Public Salary Extortion under Louisiana Revised Statutes 14:136(1) violated his constitutional rights guaranteed by the First, Fifth, and Fourteenth Amendments of the United States Constitution as a result of the statute's alleged vagueness and overbreadth.

2. Whether the retrial of the petitioner constituted a violation of the Double Jeopardy Provision contained in the Fifth Amendment of the United States Constitution. A mistrial was declared during the first trial due to sequestered witnesses learning that a state's witness had been arrested for perjury.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT:

I. Louisiana Revised Statute 14:136 is constitutional 7

II. The retrial of petitioner did not constitute double jeopardy 8

ARGUMENT:

I. Alleged unconstitutionality of Louisiana Revised Statute 14:136, Public Salary Extortion 9

II. Alleged violation of the constitutional prohibition against double jeopardy 15

CONCLUSION 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

La.R.S. 14:136(1) 1,2,4,6

Constitution of the United States, First Amendment 3,7

Constitution of the United States, Fifth Amendment 3

Constitution of the United States, Fourteenth Amendment 3

State v. Cannon, 383 So.2d 389 (La. 1980) 5,6,19

La.R.S. 14:136 7,9,10,14,20

Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1925) 9

Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 369 (1951) 9,10

United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1946) 9

Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1956) 9,10

United States v. Harris, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed.2d 989 (1953) 10

Huerta v. Flood, 103 Arizona 608, 447 P.2nd 886 (1968) .. 12

La.R.S. 14:67 14

La,R.S. 42:727(J) 14

Lee v. United States, 97 S.Ct. 2141 (1977) 16,19

United States v. Dinitz, 96 S.Ct. 1075 (1976) 16,17

La.R.S. 14:123 17

United States v. Jone, 400 U.S. 470, 476, 91 S.Ct. 547, 552, 27 L.Ed.2d 543 (1971) 19

No.

IN THE

Supreme Court of the United States
OCTOBER TERM, 1981

H.M. "MIKE"CANNON,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent

On Petition for a Writ of Certiorari to
The Supreme Court of Louisiana

OPPOSITION TO PETITION FOR CERTIORARI

Respondent, the State of Louisiana, respectfully opposes the petition for a writ of certiorari, and, in answer to the petition contends that the trial court was correct in upholding the constitutionality of Louisiana Revised Statutes 14:136(1) and, that the Louisiana State Supreme Court properly affirmed the trial court's decision. The State therefore prays that this Honorable Court refuse to grant the writ of certiorari requested by petitioner.

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

Louisiana Revised Statutes 14:136(1) Public Salary Extortion

Public salary extortion is committed when any person shall:

(1) Solicit or receive, or attempt to solicit or receive, either directly or indirectly, the payment of any money or other thing of value from any public officer or public employee to himself or any other person or political organization, through any means or form whatsoever and for any purpose whatsoever, when such payment is obtained or solicited upon suggestion or threat that the failure to make such payment shall result in the loss or impairment of value to such officer or employee of his office or employment, or when such payment shall be a reward or remuneration for securing such office or employment; and proof that such payments were collected from or paid by such officers or employees on a uniform or progressive percentage or amount basis, shall be presumptive evidence that payments were made under duress or upon the considerations set forth hereinbefore; or

(2) Solicit or receive or attempt to solicit or receive, either directly or indirectly, the contribution of any money or other thing of value for any general, primary or special election or for any other political purpose, from any person holding any office or employment for remuneration or profit, including those persons who work on a commission basis, with the state, who receive a remuneration of two hundred dollars per months or less from such employment; provided that this Subdivision shall not apply where the person solicited or whose con-

tribution was received was an elective public officer or a candidate for any elective public office.

Whoever commits the crime of public salary extortion shall be imprisoned for not more than five years with or without hard labor or shall be fined not more than five thousand dollars or both.

II.

Constitution of the United States, First Amendment.

III.

Constitution of the United States, Fifth Amendment.

IV.

Constitution of the United States, Fourteenth Amendment.

STATEMENT OF THE CASE

On or about January 28, 1979, an article by reporter Gibbs Adams appeared in the Baton Rouge Sunday Advocate. The article dealt with the reporter's findings concerning operation of the Clerk of Court's Office in East Baton Rouge Parish. Specifically, the article indicated that the Clerk of Court, Mike Cannon, was using public funds to finance his re-election campaign. His scheme, according to the newspaper, was to indicate to certain of his employees that if they would contribute certain amounts to his re-election campaign, he would make up their contribution through a salary increase. (The salary increase would not become a reality to the employees until the second year of its implementation.)

After subsequent investigation by the District Attorney's Office, a grand jury indicted Mike Cannon with public salary deduction (La.R.S.14:135) and public salary extortion (La.R.S. 14:136(1)). These original grand jury indictments were quashed by the Louisiana State Supreme Court on a technicality involving the composition (one member) of the grand jury.

After a subsequent grand jury indictment on the same offenses, the matter was tried September 20, 1979. That trial ended in a mistrial at the petitioner's motion. Petitioner claimed that the trial witnesses were intimidated when they learned of the arrest of one of the prosecution's witnesses for perjury. The trial judge sustained petitioner's motion and the trial was reset. Petitioner then applied for a writ of certiorari to the Louisiana State Supreme Court contending that his retrial would constitute double jeopardy. That honorable court refused to make such a finding and ruled that the November trial date should remain firm.

On Friday, November 16, 1979, petitioner was tried a second time. He was found guilty by the trial judge of public salary extortion, and found not guilty of public salary deduction. The Louisiana State Supreme Court excellently summarized the evidence adduced against the petitioner at trial when considering this case on earlier writs of certiorari in

State v. Cannon, 383 So.2d 389 (La. 1980), at page 392, wherein Justice Watson stated:

> "(2) Among the seven witnesses called by the State were six employees of defendant's office. None of the State's witnesses testified to overt threats by defendant. However, defendant did ask the supervisors in his office to contribute a full month's salary and the assistants to contribute a half month's salary, promising that those who helped him would be helped in turn. When one employee asked what he meant, he replied . . . through evaluations when evaluation time came.' (Tr. 89.) According to another witness: 'He said that he would give us a raise to make up any contribution to the pledge.' (Tr. 133.) This employee was told to speak to others and '. . . remind them that evaluation time was coming up and it would be appreciated.' (Tr. 133-134.) The witness said: 'I was to report before January 15 which employees did or did not pledge.' (Tr. 160.)
>
> By mentioning the upcoming quarterly evaluations and their concomitant raises when discussing campaign contributions, Cannon gave the clear impression that there would be no raises unless the recommended month's salary or halfmonth's salary was contributed to the campaign fund. The words were spoken in the context of an employer-employee relationship and the reasonable conclusion is that they were intended to intimidate. Although some witnesses testified that they felt no compulsion to contribute, other employees said they assumed that if they contributed they would receive raises."

Sentencing was stayed by the trial judge while petitioner was allowed to apply for the writs of certiorari mentioned above. The Louisiana State Supreme Court granted these writs to consider the issues alleged, namely: the unconstitu-

tionality of the statute, violation of double jeopardy, and the insufficiency of evidence to convict. In a lengthy opinion, that honorable court affirmed petitioner's conviction. *State v. Cannon,* 383 So.2d 389 (La. 1980) rehearing denied.

Mr. Cannon was then sentenced to pay a one thousand dollar ($1,000.00) fine, and was given a five (5) month suspended sentence with two (2) years active supervised probation. At the sentencing hearing, the petitioner filed a motion for a new trial on the grounds of double jeopardy based on newly discovered evidence. This motion was denied by the trial court.

Finally, petitioner filed an original appeal with the Louisiana State Supreme Court again presenting both the issue of double jeopardy, and, that of the unconstitutionality of La.R.S. 14:136(1). That honorable court affirmed both the conviction and sentence without written opinion.

SUMMARY OF ARGUMENT

I. LOUISIANA REVISED STATUTES 14:136 IS CONSTITUTIONAL

The State of Louisiana submits to this Honorable Court that the Public Salary Extortion Statute in question is neither unconstitutionally vague nor overbroad. We also submit that petitioner's conviction under the statute did not constitute a denial of due process of law.

La.R.S. 14:136 is not a statute using terms so vague that men of common intelligence must guess as to its meaning and differ as to its application. It gives adequate warning of the conduct proscribed and also marks boundaries sufficiently distinct for judges and juries to fairly administer the law. The record in this case shows that petitioner himself clearly knew that his conduct was at odds with the law as he sought to "white wash" and "cover up" his actions of soliciting campaign contributions while tying them in to employee quarterly job evaluations. Petitioner was not denied due process of law.

The State also asserts that this criminal statute is not so overbroad as to impinge upon protected First Amendment freedoms. Petitioner alleges that certain words and phrases in the law are overly broad. These are: "suggestion", "other thing of value", and "any other political organization." The State contends that all the above-mentioned words, when considered in context with the rest of the statute, possess a definite, understood meaning in their application. We also contend that the statute gives a person of ordinary intelligence fair notice of what conduct is criminal. To reiterate, the petitioner in this case obviously knew that his conduct was in violation of this allegedly overbroad statute.

The petitioner also places reliance on an Arizona statute which was found to be unconstitutional by the Arizona Supreme Court. That statute makes it a crime just to *ask* an employee for a contribution. This reliance is misplaced because the Public Salary Extortion Statute in Louisiana at issue in this case is distinguishable. The soliciting for contributions from the employees must also be accompanied by the

suggestion or threat that the employee's job security is tied to the contribution.

We therefore submit that a reasonable reading of the statute will prove that it does not overly restrict the activities of Louisiana citizens to the extent that cherished First Amendment rights are infringed upon.

II. THE RETRIAL OF PETITIONER DID NOT CONSTITUTE DOUBLE JEOPARDY.

Petitioner contends that the arrest of a state witness for perjury during a lunch break of his first trial was a result of bad faith action on the part of the district attorney's office and as such, any retrial on the same charges would violate the constitutional prohibition against double jeopardy.

The State would submit to this Honorable Court that, as a factual matter, the actions of the assistant district attorney who accompanied the officers in order to direct them to the witness did not constitute bad faith. The Louisiana State Supreme Court in considering this same factual question found that at most, the prosecutor was guilty of mere negligence. The record shows that this arrest was not the volatile public display as petitioner suggests. Also, the defense witnesses who testified on the motion for mistrial indicated that they merely heard about the arrest rather than actually seeing it. The witness in question who was arrested admitted to lying on the stand earlier during a grand jury hearing. Perjury in Louisiana is a felony. We submit that it was not his intention to bring about a mistrial or to intimidate other witnesses by this arrest. In fact, the State strenuously argued against the motion for mistrial.

The State of Louisiana would submit to this Honorable Court that the prosecutor was not acting in bad faith in having a witness arrested for perjury. We further contend that according to the decisions of this Honorable Court, the prosecutor's actions in this case were not of the type which bar a retrial of a defendant on grounds of double jeopardy.

ARGUMENT

I.

ALLEGED UNCONSTITUTIONALITY OF LOUISIANA REVISED STATUTE 14:136, PUBLIC SALARY EXTORTION.

The petitioner here complains that the statute under which he was convicted is unconstitutional in that it suffers from vagueness and overbreadth. The State submits that the statute does not allow a public official to solicit campaign contributions from his employees under suggestion or threat that some aspect of their job or job security is directly connected to such a contribution. The statute fairly puts any public official on notice that he cannot solicit campaign contributions from his employees if he ties such contributions in to the employee's jobs. Furthermore, only such solicitations made under suggestion or a threat of impairment to the job or to the job security are proscribed by the statute. Solicitations which do not use public employment or any aspect of public employment as leverage to force an employee to contribute are not proscribed by this statute. The statute is not overbroad.

VAGUENESS

The rule is well settled that a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law. *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1925). However, no more than a reasonable degree of certainty can be demanded. All that can be required is that the language, when measuring by common understanding and practices, give adequate warning of the conduct proscribed and mark boundaries sufficiently distinct for judges and juries to *fairly* administer the law. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 369 (1951); *United States v. Petrillo*, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1946); *Roth v. United States*, 354 U.S.

476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1956). In *Roth v. United States,* supra, the court held that a statute was not vague and outlined the test:

> "Lack of precision in a criminal statute is not itself offensive to the requirements of due process; the Constitution does not require impossible standards, and all that is necessary is that the language covers sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices."

Boyce Motor Lines, Inc. v. United States, supra, further reinforces this point of characterizing the vagueness doctrine as embracing the notions of fairness and flexibility:

> "Few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations and the practical necessities of discharging the business of government inevitably limits the specificity with which legislators can spell out prohibitions."

See also, *Roth v. United States,* supra, and *United States v. Harris,* 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed.2d 989 (1953).

The State maintains that, if the trier of fact finds that an employer uses an employee's job as leverage to solicit campaign contributions, he comes within the ambit of La.R.S. 14:136. An employer cannot even suggest to his employees that their jobs are connected with their contributions. In the instant case, several employees testified that the petitioner requested help with his political campaign, indicating specific amounts which would be a "super effort" or a "fair share." He then asked the supervisors to go back to their subordinates, mention his "request", and mention as well the fact that quarterly evaluations were coming up. The petitioner specifically tied campaign contributions to job evaluations. Such conduct clearly comes within the ambit of the statute. (Tr. p. 30.)

Furthermore, the petitioner was well aware of the fact that his conduct came within the ambit of the statute. When he

was contacted by the reporter, Gibbs Adams, regarding his salary increases, he had a meeting with his supervisors asking them not to mention the campaign contributions. After the newspaper article came out, he had another meeting with his supervisors requesting that they tell everybody that the contributions were "voluntary" and that they not tell anybody about the fact that he had requested the contributions. He further mentioned that he did not want his employees talking to the district attorney's office. The fact that the petitioner, before he was indicted for anything, requested that his employees not tell anybody what he had done, indicates that the petitioner was well aware of the fact that he had done something wrong. In fact, his conduct toward the newspaper and toward the district attorney's office during that initial period was akin to a man trying to cover up what he had done. It was never conduct one associates with an innocent man who feels he has nothing to hide.

In conclusion, the statute in question zeroes in on the relationship between a public official and his employees. The Louisiana legislature recognized that public employees are particularly vulnerable to the campaign solicitation of their politician-boss. Even though Hatch Act proscription does not apply to City Parish employees, the legislature deemed it necessary to protect non-civil service employees at least to the extent that their salaries could not be used to finance their employer's political campaign. Because the employer-employee relationship in public service jobs is so vulnerable to coercion, the legislature felt that campaign solicitations should be regarded particularly carefully. If those solicitations were in any way connected with the employment, then the legislature sought to make such solicitations unlawful. In this instance, the solicitations were directly connected with employment in that specific numbers, i.e. one month's salary or one half month's salary, were suggested by the petitioner, and, were suggested in virtually the same breath as the reminder that quarterly job evaluations were coming up. Certainly, a bad quarterly evaluation is an impairment to employment, as well as to the security of employment. A bad evaluation determines whether or not a person gets a raise or

is promoted. Too many bad evaluations can very logically lead to dismissal. No one specifically testified that he or she was so threatened by the petitioner, but the suggestion was there. The connection between the contribution and the job was explicitly made by the defendant, thus making his conduct unlawful.

OVERBREADTH

The defendant bases his "overbreadth argument" on the treatment by the Arizona Supreme Court of a statute prohibiting political contributions in Arizona. (*Huerta v. Flood*, 103 Arizona 608, 447 P.2nd 886 (1969). The Arizona revised statute reads:

> "No public officer or public employee of the State, a State agency or of a political subdivision shall directly or indirectly command, ask, coerce, or attempt to coerce any officer or employee of the agency, department, division for which he had direct supervision to pay, lend or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency or person for political purposes."

The petitioner's reliance on the Arizona court decision, and its treatment of this statute, is misplaced. The Arizona statute says that no one can ask an employee for a political contribution. The Louisiana statute does not prohibit a boss from asking an employee for a political contribution. The Louisiana statute prohibits a boss asking an employee for a political contribution *if* he uses the employee's job as leverage for obtaining that contribution. The Arizona statute forbids the asking. The Louisiana statute forbids asking along with the suggestion that employment may suffer if the request is not granted. As the Arizona Supreme Court said, "It's an old cliché that 'there is no harm in asking'." *Huerta* at 869. The Louisiana statute does not forbid the mere asking, nor can the petitioner claim that he merely asked. He called his supervisors into his office and requested assistance in his political election. He then showed his supervisors a

chart with a break down of the amount of funds he expected to be given by them and their subordinates. He mentioned that they should make it clear to their subordinates that the quarterly evaluations were coming up. The inference that the contributions were expected, and, that they were to be tied to the security of the employee's jobs was so strong under that context that the petitioner himself realized that he had better call his supervisors in after the newspaper reporters' initial interrogation and explain that the political pledges were to be on a "voluntary" basis. The petitioner himself realized the atmosphere he was creating with his supervisors. He sought hurriedly to white-wash that atmosphere when he realized that the media was looking into the situation.

The gravaman of Public Salary Extortion is the threatening or suggesting of a threatening situation to a public employee with his job for purposes of extracting some payment or something of value from that public officer or employee. The petitioner suggests that the statute is overly broad for several reasons.

First, the petitioner says that the word "suggestion" is overly broad. However, the definition of the word suggestion, as quoted in petitioner's brief is clear and subject to reasonable determination by an average man. The petitioner suggested that his subordinates' jobs were intermingled with their political contributions to his campaign. The suggestion was so clear and obvious that, as noted above, the petitioner himself labored to correct it prior to his indictment. The trial court found that the petitioner had definitely:

> "cause(ed) to be present to the mind as an object of thought, an idea to be acted upon, a question or problem to be solved." (Oxford English Dictionary, Oxford University Press, 1971.)

The suggestion of the proper course of action for the employees called in was certainly very clear. At least, it was clear enough to be transmitted to the subordinates of the supervisors who testified.

"Other thing of value" is another phrase of which the petitioner complains. Actually, it is much akin to the "anything of value" found in La.R.S. 14:67, theft. The State submits that triers of fact have little difficulty in considering such phraseology in connection with theft. Thus, they should have little difficulty treating it in conjunction with Public Salary Extortion.

Next, the petitioner maintains that the statute is overly broad because it prohibits activities other than partisan politics. Specifically, he complains about "any political organization . . . for any purpose whatsoever." Classified public employees in the State of Louisiana are covered by La.R.S. 42:727(J) which "prohibits participation of any employee of the state agencies from engaging in political activity except as to their rights to freely express their views as citizens and cast their votes . . ." Partisan politics is nowhere mentioned. Classified state employees are allowed only to express their political views and to vote. Any other political activity is forbidden. The State would also seek to point out that La.R.S. 14:136 does not prohibit the employee from expressing his political views or even from contributing to his employer's political campaign. La.R.S. 14:136 prohibits the employer from soliciting such a contribution coupled with a threat or suggestion etc., . . . The rights of non-classified employees are not infringed by this statute except to the extent that they are free from "suggestions" and "threats" from their employers or other persons who would have the power to threaten them. Finally, the statute prohibits "any person" from extorting or attempting to extort something of value from a public employee through threats to his job. The reasonable construction of this statute would leave the reader to assume that Public Salary Extortion is only at issue when a person has the power to impair a public official or employee's job or the security of his job. Furthermore, the reasonable reading of the Public Salary Extortion Act and the constant reference to "payments" should lead a reasonable man to believe that a public employee was being requested to give up part of his salary or an equivalent of his salary in return for keeping his job or being able to have the

opportunity to advance in his job. The petitioner hypothesizes a situation in his brief where an irate member of the public demands that a public official either do his duty, (fix potholes in the street), or the irate citizen will turn him out of office. This hypothesis is inappropriate to the statute. First, threatening someone to do their duty is not a threat as foreseen by the statute. No salary or an equivalent of salary is being coerced out of the public official. Secondly, no public official would pay an irate citizen part of his salary or the equivalent of his salary in order to keep from being turned out of office (or if he did, he would come under the statute proscribing vote buying).

In conclusion, the State of Louisiana submits that a reasonable reading of the statute will lead this Honorable Court to the conclusion that it is explicit in its restrictions, and that it does not overly restrict the activities of Louisiana's citizens. Rather, it protects helpless public employees from being forced to pay money to keep their jobs secure.

II.

ALLEGED VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.

Petitioner, H.M. "Mike" Cannon, waived his right to trial by jury electing instead to be tried before a judge. The trial commenced on September 20, 1979, with the State introducing the testimonial evidence of Larry Owens, Reine Landry, and Angie Wilson. Then, Miss Judith Redden was called to the stand to testify of behalf of the State. After Miss Redden's testimony at trial was contrary to that anticipated by the State, the State pled surprise and requested permission to cross-examine her on that basis. (Tr. p. 72.) When Miss Redden was questioned as to whether or not the defendant had expected her to give him money, she responded negatively. (Tr. p. 72.) The State reminded Miss Redden that she was under oath and allowed her to view the grand jury transcript which reflected that she had made such a statement. (Tr. p. 73.) Again, Miss Redden denied making the statement and responded that she did not know

how it got in there. (Tr. pp. 74, 75.) By her own testimony Miss Redden established that she had testified two or three times before the grand jury investigating the Cannon matter. (Tr. pp. 85, 90.) Additionally, she admitted lying during her first grand jury appearance and stated that she later rehabilitated herself. (Tr. pp. 90, 91.) Prior to her testimony of September 20, 1979, Miss Redden was informed that she should tell the truth at trial and her failure to do so would result in an indictment for perjury. (Tr. p. 92.)

Subsequently, the State called Mr. Jack Ambrose, Gretchen Black, and Euther Hughes as witnesses at this trial. After these witnesses testified, the Court recessed for lunch. During this recess, Mr. David Bourland, one of the three prosecutors in this case, provided information in the form of an affidavit which provided the basis for the arrest warrant issued for Miss Judith Redden charging her with perjury. (Tr. p. 174.) When two plain clothes deputies from the Sheriff's Office arrived to arrest Miss Redden for perjury, Assistant District Attorney Mr. Bourland did go with the deputies to show them Miss Redden. He also informed Miss Redden that she was being arrested for perjury. (Tr. pp. 164, 174, 175.)

After the petitioner was informed that Miss Redden had been arrested, he moved to quash the indictment and for a mistrial. The trial court denied the motion to quash but granted the motion for mistrial after hearing the testimony of five witnesses.

This Honorable Court in *Lee v. United States,* 97 S.Ct. 2141 (1977), discussed the issue of double jeopardy. In *Lee,* the defendant moved for a mistrial on the grounds that the bill of information failed to charge the requisite specific intent necessary for the offense of theft. After the trial court granted the motion dismissal, the defendant argued that such dismissal barred reprosecution for the same offense. The court in *Lee* reiterated the court's position in *United States v. Dinitz,* 96 S.Ct. 1075 (1976), and found that:

> "Double jeopardy does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the

> substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad faith' conduct by judge or prosecutor, threats the 'harrassment of any accused by succcessive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant'." *(Dinitz,* at p. 1081.)

Clearly, the transcript in the instant matter does not reflect that the State's conduct was intended to induce the petitioner to seek a mistrial in order that the State could obtain a more favorable position at a subsequent trial. In fact, the testimony provided by virtually all witnesses was strong enough to prove the petitioner's guilt beyond a reasonable doubt. The State submits that its conduct was not the type of conduct which constitutes prosecutorial overreaching.

Under La.R.S. 14:123, perjury, is defined as:

> "The intentional making of a false written or oral statement in, or for use in, a judicial proceeding, or any proceeding before a board or official, wherein such board or official is authorized to take testimony. In order to constitute perjury the false statement must be made under sanction of an oath or an equivalent affirmation, and must relate to matter material to the issue or question in controversy.
>
> It is a necessary element of the offense that the accused knew the statement to be false; but an unqualified statement of that which one does not know or definitely believe to be true is equivalent to a statement of that which he knows to be false."

Conviction for this offense exposes the defendant to a possible prison term at hard labor. Thus, the offense is a felony. It is the position of the State that they have a duty to the people of Louisiana to insure that crimes will not go unpunished. Therefore, Mr. Bourland believed that he was duty bound to sign the affidavit charging Miss Redden with

the felony offense that she committed in his presence.

When the Court attempted to ascertain who was present when the arrest occurred and what effect the arrest had on prospective witnesses, Miss Redden initially stated that she was sitting by one witness at the time of her arrest. (Tr. p. 170.) Miss Loretta Henry stated that it "all happened kind of fast; all of a sudden I just see Judy coming out of the courtroom kind of like a couple of people behind her before I realized what was happening. The newsmen are all rushing in the elevator and the door closed and I realized she'd gotten arrested." (Tr. p. 144.) As Miss Redden was, in fact, arrested while she was sitting on a bench outside of the courtroom, Miss Henry's testimony supports the State's position that the arrest was not a public display, as her testimony demonstrates that not only did she *not* see the arrest, but was not even aware how and when the arrest occurred. Likewise, Kathy Broussard and Janice Davis, both stated that they merely heard that Miss Redden had been arrested. (Tr. p.148, 158.) Moreover, all witnesses testified that they would testify truthfully at a subsequent trial despite what they saw or heard at this September 20th trial. (Tr. pp. 146, 151, 157, 160.)

The State respectfully submits that if it intended to use the arrest of Miss Redden to intimidate the other witnesses, then this purpose would have been better accomplished by such witnesses viewing the arrest. Of course, the State did not intend such consequences which is why all witnesses merely *heard* about the arrest instead of viewing it.

There is no evidence whatsoever in the record to support the contention that the State acted in bad faith or had any reason to abort the trial in order that it could reprosecute this case. In fact, the record reflects that the State was opposed to the mistrial and sought to elicit responses from the witnesses which would establish that they would testify truthfully despite what they had heard concerning Miss Redden's arrest. The Louisiana State Supreme Court reached the following similiar conclusion after reviewing the record in the case:

"(12) There is no evidence that the State deliber-

ately attempted to abort the trial. The State opposed defendant's motion for mistrial and sought to elicit testimony from defense witnesses that they would tell the truth despite Ms. Redden's arrest (Tr. 146, 151, 157, 160 (9/20/79).) The record does not reveal that the State was losing its case and provoked a mistrial to gain an opportunity to begin anew. The prosecutor exhibited no bad faith; the most that can be said is that he was negligent.

Ms. Redden testified that she was arrested while sitting outside the courtroom when other witnesses were in the area. (Tr. 170, (9/20/79).) Although it would have been possible and preferable for the arrest to have taken place elsewhere, all the witnesses who knew of the incident swore that they would testify truthfully despite what they saw or heard. (Tr. 146, 151, 157, 160 (9/20/79).) While we cannot condone the prosecutor's actions, there is no evidence that he acted in bad faith or that his conduct was so gross or wanton as to warrant the dismissal of these proceedings on the basis of double jeopardy. Because the witnesses all testified that the prosecutor's action would not prevent them from telling the truth, there was no evidence that the action seriously prejudiced defendant." *State v. Cannon,* 383 So.2d at pp. 295-296 (La. 1980).

As the United States Supreme Court in *Lee,* supra, pointed out, the critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged. A mistrial ruling invariably rests on grounds consistent with reprosecution, citing *United States v. Jone,* 400 U.S. 470, 476, 91 S.Ct. 547, 552, 27 L.Ed.2d 543 (1971). In *Lee,* the Court determined that the rules of double jeopardy would permit retrial after a declaration of mistrial.

CONCLUSION

For the foregoing reasons, the State of Louisiana respectfully contends in this opposition to the petition that the Louisiana Public Salary Extortion Statute, (LA.R.S. 14:136), is neither vague nor overbroad so as to result in a violation of petitioner's rights under the First Amendment or due process principles. His conviction under this statute did not constitute a denial of due process in its application.

We also submit that the retrial of petitioner did not constitute a violation of his right against double jeopardy contained in the Fifth Amendment.

The State of Louisiana prays that this Honoable Court refuse to issue a writ of certiorari in order to review the decision of the Louisiana State Supreme Court in this case as that honorable court correctly decided the issues involved. The petition for a writ of certiorari should be denied

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

BARBARA B. RUTLEDGE
Assistant Attorney General
State of Louisiana

OSSIE BROWN
District Attorney
Nineteenth Judicial District
Baton Rouge, Louisiana

ROBERT H. HESTER
Assistant District Attorney
Nineteenth Judicial District
Baton Rouge, Louisiana

E. KAY KIRKPATRICK
Assistant District Attorney
Nineteenth Judicial District
Baton Rouge, Louisiana

By:
E. Kay Kirkpatrick
Assistant District Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Opposition to Petition for Certiorari have been served, postage prepaid, to Mr. Steve M. Marks, Attorney for Petitioner, 301 St. Charles Street, Baton Rouge, Louisiana 70802, this_____day of October, 1981.

E.Kay Kirkpatrick
Assistant District Attorney